

BOOKS Printed for D. Brown, in Exeter Exchange in the Strand; T. Ward in the Inner-Temple Lane; and W. Meares at the Lamb without Temple-Bar.

A *Rchaologia Britannica*, giving some Account additional to what has been hitherto Publish'd of the Languages, Histories, and Customs of the Original Inhabitants of *Great Britain*, from Collections and Observations in Travels through *Wales, Cornwall, Bas Bretagne, Ireland, and Scotland*; by *Edward Lhuyd*, M. A. of *Jesus College*, Keeper of the *Ashmolean Museum* in *Oxford*.

An Historical Account of the Ancient and Modern State of the Principality of *Wales*, Dutchy of *Cornwal*, and Earldom of *Chester*, Collected out of the Records of the Tower of *London*, and divers ancient Authors, by *Sir John Doderidge*, Knt. the 2d Edition; to which is added, his Royal Highness the Prince of *Wales's* Patent, both in *Latin* and *English*; also an account of his Dignity, Privileges, Arms, Rank and Titles of his Sons and Daughters.

The Original, Nature and Immortality of the Soul, a Poem, with an Introduction concerning Human Knowledge, written by *Sir John Davis*, Attorney General to *Q. Elizabeth*, with a Prefatory Account concerning the Author and Poem. The 2d Edition.

A Discourse concerning the Existence of God; by *Edward Pelling*, D. D. Rector of *Petworth* in *Suffex*, and Chaplain in Ordinary to his Majesty.

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9. C. C.
H. GROTIUS

Of the **RIGHTS** of
WAR and PEACE,
In **THREE VOLUMES;**

In which are explain'd
The LAWS and CLAIMS of
NATURE and NATIONS,
AND THE
Principal Points that relate either to
Publick Government, or the Conduct
of Private Life.

Together with the
AUTHOR's own NOTES.

*Done into English by several Hands; with the Ad-
dition of the Author's Life by the Translators.*

*Dedicated to His ROYAL HIGHNESS the
PRINCE of WALES.*

VOLUME the THIRD.

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A. G. R. O. T. T. S.

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our Temple Lane



H. G R O T I U S,

O F T H E

Rights of WAR and PEACE.

B O O K III.

C H A P. I.

Certain General Rules, shewing what by the Law of Nature is allowable in War; where also the Author Treats of Deceit and Lying.



I. **W**E have already seen, not only *who* may make War, but for *what Reasons* too they are permitted to engage in it. We are now to inquire (a) what is *Allowable* in War, and how far, and in what Circumstances it is *so*: And this we must consider, either simply in
VOL. III. B it

I. The Subject and Design of this Book.

(a) *What is allowable in War, and how far.* St Austin said well, in his Epistle lxxth to Count Boniface, *That in Wars themselves, (if there*

it self, or with Regard to some Antecedent Promise. What is *simply in it self* allowable in War, shall be considered first from the Law of *Nature*, and then from that of *Nations*. To begin with what *Nature* allows.

II. In War,
all things,
necessary to
the End, are
Lawful.

II. And here we must observe, *First*, That in things of a Moral Nature, as we have often said before, those which conduce to the End, do from that very End derive a Real and Intrinsick Worth: Wherefore we are judg'd to have a Right to those things, which are (in a *Moral*, not a *Physical* Sense) necessary to the obtaining our just Pretentions. By *Right* I understand what is strictly so called, and imports that Power of Acting, which the Rules of Society do indulge us in. Wherefore, as we have remark'd elsewhere, if I cannot otherwise save my Life, I may, by any Force whatever, repel him who attempts it, tho', perhaps, he who does so is not any ways to Blame. Because this *Right* does not properly arise from the others *Crime*, but from that *Prerogative*, with which Nature has invested me, of defending my self.

By which also I am impower'd to invade and seize upon what belongs to another, without considering whether he be in Fault or no, whenever what is *His* threatens me with any Imminent Danger; but I am not to claim a Property in it, for my Commission does not reach so far as this comes

there be a necessity to continue them) you may keep your Faith, and endeavour after Peace; and Epistle 205. Be then a Peace maker, even in making War. There is an excellent Discourse of Belissarius of observing Justice in making War, to his Soldiers, in Procopius Vandalic. 1. Orosius 7. Behold how Civil Wars. (when they cannot be avoided) are prosecuted by Kings, also in Christian Times. And the same of Theodosius, Let them shew any one War from the beginning of the Foundation of the City, undertaken both out of a pious Necessity and finished with divine Success, where a Battle has not produced bloody Slaughter, and Victory a cruel Revenge?

comes to, but only to detain it till my Security be sufficiently provided for; as we have formerly declared. So by the Law of Nature, I have a Right to take from any one what he has of mine, and if this cannot easily be effected, I may take what is Equivalent to it; and this I may do too for the Recovery of Debt. Upon which Accounts also we have a Property in such Things, because that Equality which falls to us by a precedent Contract, cannot otherwise be repair'd.

So likewise where the Punishment is Just, there all manner of Violence and Force, and whatever is a Means necessary to execute that Punishment, or is a Part of it, is Just too; as Devastations by Fire or otherwise, provided that they exceed not the Bounds of Equity, but bear a Proportion to the Offence committed.

III. We must remember, *Secondly*, That this our Right is not to be accounted for only by the first Occasion of the War, but also from other subsequent Causes; as in a Suit of Law, where the contending Party does often acquire and find out a new Right, after the Process is commenced, which was not thought of before. Thus they, who join with him that invades me, whether they be Allies or Subjects, do give me a Right of defending my self against them likewise. Thus they, who engage with others in an unjust War, especially in a War which they might or ought to have known to be unjust, are thereby obliged to reimburse the Charges, and to repair the Damages of it, because it is, thro' their Fault, that they are sustain'd. Thus too, those who come into the Measures of a War undertaken without any warrantable Reason, are themselves culpable and obnoxious to Punishment, in Proportion to the Injustice that accompanies their so doing; according to *Plato's* Opinion, who justifies the Conti-

III. *What is Lawful and Right, does not arise only from the first Motive of the War, but also from necessary Causes in the Course of it.*

nuance of a War, till the Guilty are compell'd to give Satisfaction to those, who being Innocent, are Sufferers by 'em.

IV. Some Things may by Consequence be acted without any Injustice, which would be no ways Lawful had they been purposely and Originally design'd.

IV. We must observe, *Thirdly*, (b) That many Things sometimes fall in indirectly, and beyond our Design, to be Lawful to us, to which, in the Nature of the Things simply consider'd, we have no Pretence. How this holds Good in the Case of Self-Defence, we have elsewhere shewn. Thus in the getting of our own, if just so much as is precisely our Due cannot be had, we have a Right to take more, but under the Obligation of restoring the Value of the Overplus. Thus a Ship full of Pyrats, or a House of Thieves may be sunk and fired, tho' within the Ship or the House there may be or Children or Women, or other innocent Persons, who from such an Assault must needs be expos'd to manifest Danger. *Nor is he Guilty of Murder, says St. Austin, who has inclos'd his Estate with a Wall, if any one by the Fall of it shall be wounded and die.*

But, as we have frequently advis'd before, ev'ry thing that is strictly due is not always absolutely Lawful; for sometimes our Charity to our Neighbour will not suffer us to use our full Right. Wherefore in such Cases, we ought to take all possible Care to prevent all such Accidents, which may fall out beyond what we principally aim at; unless the Good we design be far Greater than the Evil we fear, or unless, where the Good and the Evil being Equal, our Hopes of obtaining the Good, be greater than our Fears of the Evil, which Prudence must determine; yet so, that always in a doubtful Case we incline, as the safer side, to that Part which provides rather for another's Advantage

(b) That many things sometimes fall in Indirectly, and beyond our Design.] See upon this Subject, Thom. Prim. Secund. Quæst. lxxiii. art. 8. and Molinas, Tract. ii. Disput. cxi.

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vantage than our own. *Let the tares grow up* (says our best Informer) *lest whilst you gather up them, ye root up also the wheat with them.* To destroy whole multitudes, says Seneca, without Distinction, looks like the *Rage of Fire or the Fall of Buildings*. Histories tell us, how much Sorrow and Repentance such an immoderate Revenge cost the Emperor *Theodosius*, upon the Reproof of St. *Ambrose*. Mar. 13. 29

Nor tho' God does so sometimes, ought it to be an Example to us, because of that Absolute Right of Dominion, which he has over us, which he has not granted us to have over one another. And yet even God himself, who is the just Sovereign of Mankind, does often spare a multitude of wicked Men, for the sake of a few that are good; thereby declaring his Equity, as he is a Judge; as fully appears from *Abraham's* interceeding with God for *Sodom*. And from these general Rules, we may easily perceive how far our Right extends against our Enemies by the Law of Nature. Gen. 18. 23

V. Here also there uses to arise another Question, what we may Lawfully do to those, who are not our Enemies, nor are willing to be thought so, and yet supply our Enemies with Necessaries. There have been formerly, and still are great Disputes about this matter, some contending for the rigour of War, and others for a Freedom of Commerce, which, by the Law of Nations, one State may demand with another. V. What we may do against them that supply our Enemies with Necessaries explained by Distinction

But first we must distinguish between the things themselves. For there are some things which are of use only in War, as Arms, &c. Some that are of no use in War, as those that serve only for Pleasure; and lastly, there are some things, that are useful both in Peace and War, as Money, Provisions, (c) Ships, and Naval Stores. Concerning the first,

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first,

(c) *Ships and Naval Stores*] At Athens it was prohibited to export Flax, Casks, Wax, Pitch, &c. to the Commentator upon *Aristophanes's* Nubes and Equites.

first, (*viz.* things useful only in War) it is true what *Amalasuintha* said to the Emperor *Justinian*; He is to be reputed as siding with the Enemy, who supplies him with things necessary for War. As to the second sort of things, there is no just Cause of Complaint. Thus *Seneca* says, I will be grateful to a Tyrant, (d) if what I present him with neither encreases, nor confirms his Power of ruining the State, for such things a Man may give him without contributing to the common Calamity; which he thus explains. I will not supply him with Money to pay his Army, but if he wants Marble, or Robes of State, these being only Instruments of his Luxury, can prejudice none but himself. I will supply him with neither Soldiers, nor Arms; but if he will take it as a Kindness, I will help him to curious Artists to make him Scenes, and other things that may contribute to the softning of his fierce Temper. I would not send him Gallies, and Men of War, I would procure him Barges of Pleasures fit to indulge the softness and Mock-Engagements of wanton Kings. So also *St. Ambrose*, It is not a commendable Liberality to assist him, that conspires against his own Country.

As to the third sort of things of doubtful Use, we must distinguish the present State of the War. For if I cannot defend my self, without intercepting those things that are sent to my Enemy, Necessity (as I have said before) will give me a good Right to them, but upon Condition of Retitution, unless I have just Cause to the contrary. But if the Supply sent hinder the Execution of my Designs, and the Sender might have known as much, As, if I have besieged a Town, and blockt up its Ports, and thereupon I quickly expect a Surrender or a Peace, that Sender is obliged to make me Satisfaction for the Damage that I suffer

(d) If what I present him with neither confirms nor continues his Power of ruining the State.] See Paruta, B. vii.

suffer upon his Account, as much as he that shall take a Prisoner out of Custody, that was committed for a just Debt, or helps him to make his Escape in order to cheat me; and proportionably to my Loss, I may seize on his Goods, and take them as my own, 'till I am fully satisfied. If he did not actually do me any Damage, but only designed it, then have I a Right, by detaining those Supplies, to oblige him to give me Security for the future by Pledges, Hostages, or the like. But further, if the Wrongs done to me by the Enemy be openly unjust, and he by those Supplies encourages him in his unjust War, then shall he not only be obliged to repair my Loss, but also be treated as a Malefactor, as one that rescues a notorious Convict out of the Hands of Justice; and in this case it shall be lawful for me to deal with him agreeably to his Offence, according to those Rules which we have set down for Punishments; and for a just Restitution, we may pillage him too.

For these Reasons, those that make War (e)

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publish

(e) Publish Manifesto's, &c.] See Examples in the common War against the Egyptians, Saracens, and others, *c. ult. de Transact. c. signific. de Judais, Extrar. Copios. de Judais.* and C. 1. B. V. *Extravag. de Judais*, a Book written in Italian; Entituled, *Liber Consulat. Maris*, Of the Government of the Seas, in which are related the Constitutions of the Emperors of Greece and Germany, of the Kings of France, Spain, Syria, Cyprus, the Balears, Venetians, and Genoeses; in which, Title 274. Questions upon this Subject are treated of; and thus it is adjudged, If both the Ship and Freight belong to the Enemy, then without dispute they become lawful Prize to the Captor; but if the Ship belong to those that be at Peace with us, and the Cargo be the Enemies, they may be forced by the Persons at War, to put into any of their Ports and unlade, but yet the Master must be satisfied for the Freight of them. But on the contrary, if the Ship belongs to the Enemy, and the Goods to Neuters, we must then agree for the Ship; but if the Ship-men will not treat, they shall be forced to carry the Ship into some Port of the Captor's

publish Manifesto's, and send out Declarations to

other

tor's Party, and so pay him for the Freight of these Goods. In the Year 1438, there being War between the *Dutch* and the other *Hans* Towns lying on the *Baltick* Sea, and the River *Elb*, it was adjudged in a full Assembly in *Holland*, that even the Goods found in an Enemy's Ship, which appeared to belong to others, were not to be reputed as Prize; and this was from that time established there for a Law. So the King of *Denmark* alledged, in the Year 1597, when he sent Embassadors to the *Hollanders*, and their Allies, challenging a Liberty to carry his Goods into *Spain*, with which the *Dutch* had the most cruel War. Among the *French*, an open Trade has been always allowed to any Nation at Peace with them, even to those that have been their Enemies; and so without distinction, that the Enemies have often, under other Mens Names, concealed their own Goods, as appears by an Edict in the Year 1543, Chap. 43. which was changed into another Edict in the Year 1584. &c. In which Edicts it is expressly provided, that their Friends might, in time of War, exercise a free Trade, so that they did it in their own Ships, and by their own Men, and carry their Ships and Goods wheresoever they pleased; provided that those Goods were not *Belli instrumenta*, Warlike Ammunitions, which might assist the Enemy, which, if they were, the *French* were then allowed to take them themselves, paying a just Price for them. Here are two things to be observed; First, that Warlike Ammunitions were not made Prize, much more were indifferent Merchandizes free from this danger. I cannot deny, but that the Northern Nations have sometimes used another Right, but diversly, more from the occasion of the times, than perpetual Equity: For when the *English*, upon pretence of their Wars, stopt the *Danish* Traffick, there arose a War between those Nations long since, which had this Conclusion, that the *Danes* should lay a Tribute upon the *English*, called the *Danish* Penny, which, tho' the Cause was changed, retained its Name even to the time of *William* the Conqueror, who founded the present Royal Family in *England*, as *Thuanus* an Author of great Credit relates in his History of the Year 1589. Again, in the Year 1575, Sir *William Winter*, and Mr. *Robert Beal*, Secretary to the Council, were sent by *Elizabeth* the most wise Queen of *England*, to remonstrate, that the *English* could not bear, that the *Dutch* should, in the very heat of the War, detain the *English* Ships trading to the *Spanish* Ports, as *Rhedanus* in his *Dutch* History 1575, and Mr. *Cambden*, the *English* man, in the Year following. But when the *English*, being themselves at War with *Spain*, disturbed the Cities of *Germany* in their Trade with *Spain*, with what a disputable Right they did it, appears from the several Debates of either Nation, worthy the reading, in order to understand this Controversie. And it is observable, that the *English* themselves acknowledge

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other Nations, as well to signifie the Justice of
their

ledge this in their own Writings; where they chiefly alledge two things for their Cause, viz. that they were Instruments of War that were Transported by the *Germans* into *Spain*; and that their ancient Contracts, between both Nations, had made it unlawful to be done: As afterwards the *Dutch* and their Confederates agreed with the *Lubeckers* and their Allies in the Year 1613, That neither Party should permit the Subjects of their Enemies to Traffick within their Territories, or assist the Enemy with Mony, Men, Ships, or Victuals. And after that, in the Year 1627, it was agreed between the Kings of *Sweden* and *Denmark*, that the *Dane* should prevent all Trading with the *Dantzickers*, then at Enmity with the *Swede*, and that they should not permit any Merchandizes to pass through *Mare Cimbrium, the Sound*, (or the *Baltick*) to any of the *Swede's* Enemies, for which the King of *Denmark*, on the other side, had Advantages allowed him; but these are particular Agreements, from whence nothing can be inferred, that may be obligatory to all; for the *Germans* also alledged in their Writings, that all Merchandizes were not prohibited by Agreements, but those which had been once imported into *England*, or were procured in *England*. Neither did only the *Germans* blame the *English* for denying them to Trade with their Enemies; but the *Poles* also complained by their Embassador, that the Law of Nations was violated, because on *England's* War with *Spain*, they were denied the Liberty of Trading with the *Spaniard*, as the aforesaid *Cambden*, and *Rhe-danus* relate of the Year 1597. But the *French* after the Peace at *Vervins* made with the *Spaniard* 1598, *Elizabeth* Queen of *England* still continuing the War, being importuned by the *English*, that it might be lawful to search the *French* Ships trading to *Spain*, least any Warlike Stores might be concealed, would by no means grant it, alledging, that it was only a Pretence for Rapine, and to disturb Trade. And in that League, which the *English* made with the *Dutch* and their Allies in the Year 1515, it was agreed, that other Nations, whom it concerned to lessen the Power of the *Spaniard*, should be asked to forbid all Commerce with *Spain*; and if they did not do it freely, then that the Ships should be search'd, whether they had in them any Warlike Stores; but further than this, that neither the Ships nor Goods should be detained, or any hurt done upon that pretence, to those in Peace. And it happened in the same Year, that some *Hamburgers* were going with a Ship into *Spain*, laden for the most part with Warlike Provisions, all which was challenged by the *English* (as Prize) but they paid the just Value for the other Goods. But the *French*, when their Ships going into *Spain* were confiscated by the *English*, declared that they would not endure it. It was therefore well said of us, that publick Declarations are requisite, which also the *English* them-

their Cause, as also what probable Hopes they have to recover their Right.

Now the Reason why we refer this Case to the Law of Nature is, (f) because we find nothing in Histories decreed by the voluntary Law of Nations concerning it. The *Carthaginians* sometimes took the *Romans* Prisoners, who carried Warlike Provisions to their Enemies, but upon demand

themselves were sensible of; by whom there is an Instance of such a Remonstrance made in *Cambden*, about the Year 1591, and 1598. Neither do they always observe such Manifesto's, but have regard to Times, Causes, and Places; for in the Year 1458, the City of *Lubeck* did not think it self obliged to take notice of the Declaration the *Dantzickers* made to them, not to Traffick with the *Malgenses* and *Memelenses*, then at Enmity with *Dantzick*. Neither did the *Dutch* observe it, in the Year 1551, when the *Lubeckers* declared to them, that they should not Trade with *Denmark* with which they were then at War. But in the Year 1522 when there was War between the *Swedes* and *Danes*, when the *Dans* desired of the *Hanse* Towns to have no Commerce with *Sweden*; some Cities indeed that stood in need of his Friendship complied with him, but the others did not. The *Dutch*, when the War was hot between the *Swedes* and the *Pole*, never suffered Trafficking with either Nation to be Prohibited; but always restored to the *French* what Ships the *Holland* Vessels had intercepted, either returning from *Spain*, or going to *Spain* with which they were then at War. See the Oration of *Ludovicus Seruinus*, formerly the King's Advocate, which he made in the Year 1592, in behalf of the *Hamburgers*. But the same *Dutch* would not suffer the *English* to carry any Goods into *Dunkirk*, where they had then a Fleet: As the *Dantzickers* declared to the *Dutch* in the Year 1455, that they should carry nothing into the City of *Koningsberg*, according to *Gaspar Scutzius*, in his *Prussian History*. Also *Cabet. Decis. 43. num. 2.* and *Seraphin. de Freitas. in lib. de justo Imper. Lusitan. Asia.* where he brings in many others.

(f) Because we find nothing in Histories decreed by the voluntary Law of Nations concerning it.] The most Learned *Johannes Meursius* has many things of this Subject in his *Danish History*, B. 1. and 11. where you will find the *Lubeckers* and the Emperor for Commerce, and the *Danes* against it. See also *Cranzius Vandal. B. 14. Thuanus* in the aforesaid Year 1589, B. of Hist. 96. *Cambden* besides the above-mentioned places in the Year 1589 and 1595, where that Dispute between the *English* and the *Germans*, which they call *Hanse*, is treated of.

demand for them at liberty. When Demetrius held Attica by the Sword, and had taken the adjoining Towns of Eleusine, and Rhamnus, designing a Famine in Athens, he took a Ship, attempting to relieve it, with Provisions, (g) and hanged up the Master and Pilot of it, and by that Means deterring others from doing the like, he quickly took the City.

VI. As to the manner of prosecuting a War, Force and Terror are the most proper Methods. The Query is, whether Deceit be lawful; for Homer said an Enemy might be annoyed,

VI. Whether Fraud be lawful in War.

Ἡ δόλω ἢ βίῃ, ἢ ἀμφοτέρω, ἢ καὶ ἀμφοτέρω,

Whether by Fraud, or Force, it matters not,

And Pindar,

Χρὴ δὲ πᾶν ἐπ' αὐτῷ
δοῦν' ἀμφοτέρω τ' ἐχθρῷ.

Whether by Craft or Force we overthrow,
All means allow'd to crush the daring Foe.

And Virgil's Direction

Let Fraud supply the want of Force in War, Dryd.
is strictly follow'd even by Ripheus,

Just of his Word, observant of the Right. Dryd.

And Solon, so famous for Wisdom, also observes this

(g) And hanged up the Master and Pilot.] Not much unlike to this, is what Plutarch relates of Pompey in his History of the Mithridatic War, He set Guards at the Bosphorus, to observe if any sailed into the Bosphorus, and whosoever were caught were put to Death.

this Maxim; so did *Fabius Maximus*, commended for it by *Silius*:

Who to Force joyn'd Policy.

In *Homer*, *Ulysses*, a very wise Prince, was famous for Stratagems of War; whence *Lucian* makes this Inference, that Deceit in War is commendable: There is nothing more profitable in War, than Fraud, said *Xenophon*; and *Brasidas* in *Thucydides* gives the greatest Honour in War (b) to cunning Stratagems. And in *Plutarch*, *Agésilas* said, It is both just and lawful to deceive an Enemy. And *Polybius*, Plain Force is not of so much value in War, as Sights and Stratagems. And from him *Silius* brings in *Corvinus* speaking thus,

Bellandum est astu; levior laus in duce dextra.

(i) *Ambush in War is still by Fortune Crown'd,
The Captain's most for Policy renown'd.*

So also thought the rigid *Spartans*, as *Plutarch* observes, therefore they offered greater Victims for a Victory obtained by Policy, than by plain Force. (k) The same Author highly commends *Lysander*, ἀνὰ ταῖς τὰ πολλὰ διαποικίλλουσα τὸ πολέμῳ, vers'd in all the Arts and Skill of War. He also praises *Philopæmen*, that being instructed in the *Cretan* Discipline, he advanced that plain and open way of fighting with Sights and Stratagems. And *Am-mianus* was of Opinion, that Without any distincti-

(b) *The Stratagems of War.*] So *Virgil* says in his 11th *Æneid*, and *Sallust*, whom *Servius* quotes.

(i) *Ambush in War.*] *Mahomet's* Saying was like to this, War require: Cunning. And in *Virgil*, the Attendants of *Mars*, *Graque*, *Insidiaque*, *Rage* and *Snares*. Where *Servius*, He shews himself attended not only with Valour, but Snares, (or Ambushes).

(k) *Lysander.*] *Plutarch* compares him to *Sylla*, in whose Mind *Carbo* said there was the Lion and the Fox.

on of Valour, or Cunning, all prosperous Successes in War deserve Commendation.

The Roman Lawyers accounted all Fraud used against an Enemy, Just and Honest; and that it mattered not, whether a Man baffled his Enemy by Force or Fraud, *ὁλβὸς δὲ ψεύδος οὐ κακόν ἐστιν*, Deceit is not to be blamed, as belonging to a Soldier. And among the Divines, St. Augustine, *If the War be Just, it concerns not Justice, whether it be managed by Force or Craft.* And St. Chrysostom seems most to commend those Generals, that overcame by Subtilty.

But there are Opinions which seem to maintain the contrary, of which I shall mention some hereafter. The main Point is, whether Deceit be generally Evil; for then it will follow, that we must not do Evil, that Good may come of it; or whether Deceit be to be reckoned among such as are not universally Evil in their own Nature, but that it may sometimes happen, that they may be good.

VII. We must then observe, That some Fraud consists in a Negative Act, and some in a Positive; And here I enlarge the Word even to include those things which consist in the Negative Act, according to *Labeo*, who referred it to that Fraud which is not Evil, when a Man by Cunning preserves either his own, or anothers. *Cicero* was very short in his Politicks, when he said, *Disguise and Dissimulation should be banished out of Human Life.* For since we are not obliged to discover to others all we know, or desire; it follows, that it is lawful to dissemble some things before some Men, that is, to hide and conceal them. *We may sometimes wisely conceal the Truth* (said (1) St. Austin) *under some disguise.*

VII. Fraud in its Negative Act is not of its self unlawful.

(1) St. Austin.) And on the 5th Psalm. *Thou wilt destroy all.* It is one thing to tell a lye, and another thing to conceal the Truth. It is quoted Cause 23. Quest. 2.

disguise. And that this (m) is absolutely necessary and unavoidable in Governors, *Cicero* confesses in many places. We have a remarkable Instance of this in the Prophet *Jeremy*, Chap. xxxviii 27. where the Prophet being asked of the King concerning the Event of the Siege, by the King's Advice, wisely concealed it from the Princes, alledging another Cause of their talking together, which yet was not false. So (n) *Abraham* told *Abimelech* true, when he said *Sarah* was his Sister, according to the Custom of speaking in those Days, being his near Kinswoman, wisely concealing that she was his Wife.

Gen. 20. 2.

VIII. *Fraud* in its positive Act distinguished, either into such outward Acts as admit of several Constructions, or such as always signify the same by Agreement. *Fraud* in the former sense lawful.

VIII. But *Fraud*, which consists in a positive Act, if in things, is called a *Dissembling*; if in words, a *Lye*. Some make this difference between these two, that Words naturally signify the Intent of our Minds, but Things do not. But on the contrary it is true, that Words of their own Nature, and without the Consent and Agreement of Men, signify nothing, unless it be such a confused and inarticulate Noise as is caused by Pain, which comes rather under the Denomination of a Thing than a Speech. But if it be objected, that it is peculiar to the Nature of Man, above all other Creatures, that he can discover the Conceptions of his Mind to others, to which end Words were invented; which is certainly true; yet this also should be added, that such a Discovery is not made by Words only, (o) but by *Becks* and

(m) And that this is absolutely necessary and unavoidable.] See *St. Chrysostom* in his 1st de Sacerdotio.

(n) *Abraham*.] He would have the truth concealed, but not a lye told. *St. Austin*, Quest. in *Genesis* relatus a *Gratiano* dict. *Caus.* 22. Quest. 3.

(o) But by Nods.] *Pliny* of the *Aethiopian* Nation, B. 6. 30. Some use Nods and Motions instead of Speech, vide &c. *luz* *lratatutari* de *Sponsal.*

and Nods, &c. as among Persons that are dumb. Whether those Nods have naturally something common with the thing signified, or have only a signification by Agreement. Like to which are those Characters which (p) (as *Paulus* the Lawyer says) signifie not Words formed by the Tongue, but the Things themselves, either from some Likeness, as the *Egyptian* Hieroglyphicks, or from mere Fancy, as among the *Chinese*.

There is also another Distinction to be observ'd in this place, which we made use of to take away all doubtfulness and obscurity, concerning the Term of *the Law of Nations*. For we then said, that the Law of Nations signified, either what was allowed of by every Nation without mutual Obligation, or that which implied a mutual Obligation. Therefore Voices, Nods, and such like Indications of the Mind (as we have said) were invented to signifie by mutual Obligation, which *Aristotle* calls *ἐν συνθήκῃ*, according to common Agreement, but other things are not so. Hence it follows (q) that it is lawful for me to use other things as I please, tho' I foresee that another may place a wrong Construction upon them; I speak of the Intention of the Mind and no further. Therefore we shall give an instance, first (r) where no Harm ensues, or where the Harm it self, setting aside the consideration of the Deceit, is lawful.

Of

(p) *Paulus the Lawyer says.*] We are not obliged by the figure of the Letters, but by the Speech express'd by them, as far as it pleased, that what is signified by writing should be no less valid, than what is express'd by word of Mouth. He spoke very Philosophically, placuit, it pleased, to shew that these things are formed, ἐν συνθήκῃ, from a general Consent (or Agreement).

(q) *Thus it is lawful for me to use other things, as I please.*] See *St. Austin* of the Christian Doctrine, b. 2. c. 24.

(r) *Where no Harm ensues.*] As in the Fact of *Michal*, 1 Sam. 19. 16.

Luk. 24.
28.

Mar. 6. 48.

Act. 16. 3.

Of the first we have an Example in our Saviour, who to the two Disciples at *Emaus*, *ὑποποιεῖτο*, made as tho' he would have gone farther, unless we had rather believe he really intended so, if they had not importun'd him to stay : As God himself is said to will many things conditionally, which yet come not to pass, the condition being not perform'd. And in another place, Christ himself made as tho' he would have pass'd by his Apostles sailing on the Sea, that is, unless they entreated him to come up into the Ship. Another Example may be given in St. Paul, who circumcised *Timothy*, tho' he well knew what Sense the Jews would put upon it, viz. that the Law of Circumcision (tho' it was now really abolished) did still oblige the Children of *Israel*, in the opinion of St. Paul and *Timothy*; whereas St. Paul had something else in view, that he and *Timothy* might obtain a greater opportunity of a familiar Conversation with the Jews. For neither did Circumcision, the Ceremonial Law being abolish'd, by its Institution any longer signifie such a Necessity, neither was the Evil, which followed thereupon for a while, (tho' afterwards to be laid aside) so great, as that Good which St. Paul designed, which was a more easie introduction of the Doctrine of the Gospel. The Greek Fathers often call this dissembling *δικονομία*, (s) *Good Management*, of which we have an excellent Sentence of *Clemens Alexandrinus*, who discoursing of a good Man, says, ἐπὶ τῶν πλῆστον ὀφείλει μόνῃ ποιῆσαι τινὰ

(s) *Good Management.*] Thus St. Chrysostom says it ought to be called, not *ἀπάτη*, in his first Book *de Sacerdot.* And again, the same Author upon 1 Cor. 4. 6. This was no cheat, but a certain compliance and dispensation. And again, on 9. 20. That he might convert those that were really so, being the same in Deed, not really otherwise than what he made shew of, doing such things, but not with the like intent, as they. Hither we may refer the counterfeit Madness of David.

τινὰ ἢ ἐν αὐτῷ προνοημένως αὐτῷ πρὸς ἄλλον, &c. *He will do some things for the benefit of his Neighbour, which otherwise he would not of his own free will, and first intention.* Such was the Act of the Romans, who when they were besieged, threw a great deal of Bread from the Capitol into the Enemies Camp, that they might not be thought to have any want of it.

An Example of the latter, is the pretended Jos. 8. Flight of *Joshua* before the Inhabitants of *Ai*, which is often practised by other Generals. For we look upon the consequent harm to be lawful, from the Justice of War. But such a pretended Flight signifies nothing by common Agreement, tho' the Enemy may take it as an Effect of Fear, which the other is not bound to guard against, using his own Liberty of going where and how he pleases; and in this, or that Dress and Habit. To this End we may use our Enemies Arms, Colours, Garments, Sails, &c. as we read in many Histories.

For all these things every Man may make use of, as he pleases, tho' contrary to the general Custom; because that very Custom is in every Man's particular Choice, not as by common Consent, and therefore obliges none.

IX. There is a great Dispute concerning those Signs which Men generally use in their Commerce and Conversation; wherein a Lye does properly consist; much is found in Holy Writ against Lying, *A righteous man hateth lying*, Prov. xiii. 5. *Remove far from me falsehood and lyes*, Prov. xxx. 8. *Thou shalt destroy all those that speak lies*, Psal. v. 7. *Lye not one to another*, Colos. iii. 9. And this St. *Austin* stiffly defends; with him agree many Poets and Philosophers. Remarkable is that of *Homer*,

IX. Of that in the latter Sense the Question is difficult.

*Hated to Death may that grand Villain be,
Whose Heart and Tongue do ever disagree.*

And Sophocles,

'Tis never handsom to report a Lye;
But if on Truth a certain Mischief wait,
You may dissemble.

And Cleobulus,

The truly wise abhor a shameful Lye.

Aristotle said, κατ' αὐτὸ τὸ μὲν ψεῦδος, φαῦλον καὶ
ψεκτόν, τὸ δ' ἀληθές καλὸν καὶ ἐπαινετόν, *Lying in itself is
vile and base, but Truth is beautiful and commendable.*
Neither does the other side want its Defenders:
As first in Holy Writ, (1) it has the Precedents
of good Men guilty of Lying, without being re-
proved for it; as also the declared Opinions of
many Primitive Christians, as Origen, Clemens, Ter-
tullian, Lactantius, Chrysostome, Hierome and Cassia-
nus; and indeed almost of all Christian Writers, as
St. Austin himself confesses, herein dissenting from
them, but owning it to be a very difficult and intri-
cate Question, and by the Learned variously disputed,
for these are his very Words.

Among the Philosophers, the open Maintainers
of this Opinion are Socrates, and his Disciples Pla-
to and Xenophon; as also Cicero; and, if we believe
Plutarch and Quintilian, the Stoicks, who reckon
this among the Accomplishments of a Wise Man,
to Lye in a proper Place and Manner. Neither
does Aristotle himself seem to differ from them in
some places, whose κατ' αὐτὸ, may be interpreted
commonly, or the thing considered in itself, with-
out

(1) Of good Men, without being reprov'd for it.] Irenaus being
taught by an old Priest, thus adviles us. We ought not to be their Ac-
cusers, whom the Scriptures do not blame, but barely mention. The
Passage is in, B. 4. c. 50.

out respect to other Circumstances. His Expositor, *Andronicus Rhodius*, said thus of a Physician that told a Lye to his Patient, ἀπατᾷ μὲν, ἀπατεῶν ὅτι ἐστιν, *He deceives indeed; but yet he is not a Deceiver.* And he gives the Reason, ἐπεὶ γὰρ τέλος ἔχει τὴν ἀπάτην τῷ νοσούντι, ἀλλὰ τὴν σωτηρίαν, *Because he has no design to deceive his Patient, but to Cure him.* *Quintilian* before-mentioned defending this Opinion said, Many things are honest, or dishonest, not simply from the Fact, but from the Causes of it. So *Diphilus*,

*If a kind Lye the Life of Man can save,
Where is the Crime to rescue from the Grave?*

When *Neoptolemus* in *Sophocles* asked *Ulysses*,

What! not ashamed by Falshood to offend?

Ulysses answered,

No, if our Safety thereupon depend.

The like may be brought out of *Pisander* and *Euripides*; so in *Quintilian* also we find, it is allowable in a wise Man sometimes to tell a Lye. And *Eustathius* upon the second of the *Odyssees*, said ψεύσεται κατὰ καιρὸν ὁ σοφός, (u) *A wise Man will tell a Lye upon occasion.* He also produces Testimonies out of *Herodotus* and *Isocrates*.

X. These so different Opinions may perhaps be in part reconciled by the common distinction of Lyes, taken either in a stricter or a looser Sense.

C 2

For

X. The use of Words in another Sense, than that where in we know they are understood, not always unlawful.

(u) *A wise Man will tell a Lye upon occasion.*] Seasonably, as *Dionysius* says upon (*Terence*) *Adolph.* 4. 3. Some writing concerning *Dionysius* esteem it honest for him sometimes to deceive. And *Cicero* for *Q. Ligarius* calls a certain Lye honest and merciful.

For we do not here take the word *Lye* so largely, (*) as comprehending all that is spoken imprudently, as *Gellius* distinguished between *mendacium dicere*, and *mentiri*, to tell an Untruth, and to Lye. But here we take it to signifie a Lye spoken knowingly, in a Sense contrary either to what we think or design. For whatsoever is first, *καὶ ἀμέσως*, and immediately declared by Words, or any other signs, are the Conceptions of the Mind: Therefore he does not Lye, who tells a thing that is false, yet supposing it to be true; but he that tells Truth, at the same time thinking it to be False, does certainly Lye. It is the falshood therefore of the Expression which is requisite to the common Nature of a Lye. Whence it follows, when any Word or Sentence is *πολύσημο*, of divers Significations, either by common Use, or by the Custom of Art, or by any figurative Expression that is intelligible, then if our inward Meaning agree with any of these Significations, it is not to be reputed a Lye, (y) tho' the Person to whom we speak may take it in a different Sense.

But these ambiguous Expressions are not rashly to be allowed, but yet may upon occasions be justified. As if it relates to the instructing of one committed to our Charge, or to avoid some dangerous Questions. Of the former Christ gave us

(x) *All that is spoken imprudently.* Nothing but a guilty Mind can make a guilty Tongue; and again, no body is to be reputed a Liar, who tells a false thing believing it to be true, because as to him he does not deceive himself, but is deceived. These are St. *Austin's* Words upon that of the Apostle, *Serm. 28. and Enchirid. c. 22. relata à Gratiano in caus. 22. quæst. 1.*

(y) *Tho' the Person to whom we speak may take it in a different Sense.* As *Abraham* subtilly talked with his Servants. St. *Ambrose* thus judging of it, and approving of it, whom *Gratian* follows, *past c. si qua libet, dict. caus. 22. quæst. 2.*

an Example in himself, when he said *our friend Lazarus sleepeth*, which his Disciples understood of his taking rest in Sleep. And when he said, *destroy this temple, and in three days I will raise it up*, meaning that of his Body, he knew very well that the Jews understood it of the real Fabrick of the Temple. So again, when he promised his Disciples, *that they should sit on twelve thrones, judging the twelve tribes of Israel; and that they should drink new wine with him in his father's kingdom*, he knew very well, that they understood it of a Temporal Kingdom, whereof they were full of hopes even to the very moment of his Ascension. Thus he speaks to the people in Parables, that bearing they might not understand; that is, unless they came with such Attention and Docility (or Willingness to be taught) as was requisite. An Instance of this latter way of Speech we meet with from Prophane History in the Person of *L. Vitellius*, who being importuned by *Narcissus* to explain himself, and to speak freely, would not be prevailed upon, but still gave such doubtful and uncertain Answers, (*uu*) as would admit of various Senses. Hither we shall refer the Hebrew Saying (xx) *אם יודע אדם לא ידע אדם*, *If a Man can speak ambiguously let him, if not, let him say nothing*.

Joh. 2. 20.
21.

Luke 22.
30.
Matt. 26.
25.
Acts 1. 6.

On the contrary it may happen, that to use this kind of speaking may not only be improper; but wicked,

C 3

wicked,

(*uu*) *As would admit of various Senses.*] The same says Tacitus Histor. 3. *he spoke mystically, to draw on the Interpretation which he intended; and again, so prepared, that from the event of things he might either disown the unsuccessful, or acknowledge the fortunate.*

(*xx*) *The Hebrew Saying.*] And also this *לשונות מפניו תשלים* One may speak ambiguously for advantage, quoted by *Manasses Ben Israel*, in *suo Conciliat. quest. 27.* and *St. Chrysostom*, he is also called a Deceiver, that uses such a thing to a bad end, not he that does it to a good one.

wicked, (yy) as when either the Honour of God, (zz) or our Charity to our Neighbour, or Reverence to our Superiors, or the Nature of the thing which we treat of requires, that we should plainly declare the Truth; so in Contracts (as we have said already) whatsoever the Nature of the Contract requires to be understood, should be declared. In which Sense we may very well understand that of Cicero, *That a Lye should be banished from all Human Commerce*, borrowed from the old Attick Law, καὶ τὴν ἀγορὰν ἀφροδῆν, *No Lying in a Market*. In which places the Word *Mendacium* is to be taken so largely, as to include all obscure and ambiguous Expressions, which we, properly speaking, do not comprehend under the Notion of *Lying*.

XI. The form of a Lye, as it is unlawful, consists in a Repugnancy to another's Right. This explained.

XI. It is then required to the common Notion of a Lye, that what is either spoke, written or intimated by any other sign, cannot be otherwise understood than in such a Sense as differs from the Mind of the Person who expresses it; but to a Lye strictly taken, as it is naturally unlawful, there is necessarily required some peculiar Difference; which if rightly considered, at least according to the common Acceptation of Nations, can

(yy) *As when either the Honour of God.*] Philo of the Life of Moses, I speak of facts that relate to the Honour of God, in which only we ought to speak Truth, even if a Man were otherwise given to Lying; for Truth is the Attendant of God; and St. Austin Epist. 8. There is another Query, *Whether a good Man may sometimes Lye*; and also another, *Whether a Writer of the Holy Scriptures should lye*. See hereafter, §. 15.

(zz) *Or our Charity due to our Neighbour.*] Æschylus in his *Promethæus*, λέγει τοῖς, &c.

I'll shew you plainly what you want to Learn,
Nor will I wrap in Dark Disguise the Truth;
But tell it with a Frankness that the Talk of Friends
Does always justly Claim.

can be nothing less than the Violation of his Right, to whom we make a Sign, or direct our Discourse. For it is certain, that in respect of himself, let him speak ever so falsely, no Man can Lye. I do not here mean every Right, and what is foreign to the present Affair; but that Right which is proper and essential to the matter in hand, which is nothing else, (a) but the freedom of him, with whom we Discourse to judge of the Conceptions of our Minds, a Freedom which, as by a silent Contract, we are supposed to owe him. For this, and no other, is that mutual Obligation, which Men were desirous to introduce as soon as Language, and other Intimations of the Mind, were invented, with those other Signs generally received, as expressive of our inward Thoughts, for without such an Obligation the Invention had been to no purpose.

It is also requisite, that this Right to Judge should remain while we Discourse. For it may happen, that though there were such a Right, it is or may be taken away, by some other unexpected Right, as a Debt may cease by an Acquittance, or non-Performance of some Condition. But then it is required, that the Right that is violated be his, with whom we Discourse, and not any other's; as in Contracts there arises no Injustice, but by the violating the Right of the Contractors. Hence perhaps it is, that, after *Simonides*, *Plato* refers the speaking of Truth to Justice; and that the Lying which is forbidden, holy Writ often describes by bearing false witness against our Neigh-

C 4

Neigh.

(a) *The freedom of him.*] Hence he that deprives a Man of the Means to know, is said by the Hebrews, *furari cor. to steal away his Heart*, Gen. xxxi. 26. 27, and there *Onkelos*, and 70. *Rabbi David*, *lib. rad.* and *Rabbi Salomo*, in *Comment.* and *Abenesdra*.

Neighbour, and what St. *Austin* himself puts into the Definition of a Lye (b) *a purpose to deceive*; and *Cicero* will have the speaking of Truth referred to the Fundamentals of Justice.

But this Right may be taken away (as I have said) as by the express Consent of him, with whom we deal; as if any one shall declare before-hand that he will speak false, and the other allows it so also by a Tacit Consent, or a Presumption founded upon just Reason, or by the Opposition of another's Right, which by the Judgment of all Men is far more considerable; from these rightly understood many Inferences may be drawn, which may be of use to reconcile those different Opinions formerly mentioned.

XII. That it is lawful to speak what is false to Children and Madmen.

XII. First, when we talk to *Children* or *Madmen*, if what we say be false, yet it cannot be reputed a Lye. Because it is generally allowed,

Ut puerorum ætas improvida Ludificetur.

That childish Youth may be diverted thus.

And *Quintilian* says, speaking of Children, *We invent many Things for their Advantage.* But the immediate Reason is, because Children and Madmen not having a freedom of Judgment, they cannot be injured in that Liberty which they have not.

XIII. Also when he is deceived to whom our Speech is not directed, and whom without Speech we may lawfully deceive.

XIII. Secondly, whilst we Discourse with one Man that is not deceived, if a third Person be thereby deceived, it is no Lye; no Lye in respect of him to whom it was spoken, because his Judgment continues unperverted, as does his who hearing

(b) *A purpose to deceive.* Lactantius Institut. 6. 18. *We should never tell a Lye, with a design to deceive or hurt.*

hearing a Fable, takes it as such, or his who hears a figurative Speech, whether κατ' ἀρωνειάν by way of Irony, or κατ' ὑπερβολήν, by an Hyperbole, which Figure brings us to the Truth (c) by something which is not true; as *Seneca* speaks, and *Quintilian* calls it, *Eminentius superjectio*, A Lying Addition. Neither is it a Lye in respect of him, that hears it by the by; because he is not concerned in the Discourse, and therefore we are not any ways obliged to inform him right; but if that Person mistake our Meaning, he may thank himself, and not any Body else, for his being deceived. For (if we consider it) the Discourse between our selves is no Discourse at all in respect to a Stander-by, but a meer Sound that may indifferently signifie any Thing. Therefore neither was *Cato* the Censor to be blamed for promising Assistance to his Confederates, though falsely, nor *Flaccus* in reporting to others, that *Æmilius* had taken the Enemies City by Storm; though the Enemies were deceived by it. *Plutarch* relates the like of *Agésilas*. For nothing was here said to the Enemy, therefore the consequent Damage was extrinseck, and not in it self unlawful to wish, or cause to an Enemy. And to this kind do (d) *St. Chrysostom* and *St. Hierom* refer that Saying of *St. Paul*, wherein he reproved *St. Peter* at *Antioch* for too much judaizing, supposing that *St. Peter* well understood, that he did it not seriously, but to prevent any Offence that might be given to a weak Brother.

XIV. Thirdly,

(c) *We come to the Truth By something that is not true.* He affirms things incredible, to come to those that are credible; *Seneca* in the same Place.

(d) *St. Chrysostom* and *St. Hierom.* And *St. Cyril* against *Julian*. B. 9. towards the end; and likewise *Tertullian* in 1. and 3. against *Marcion*.

XIV. And
when our
Speech is
directed to
him, that
is willing to
be deceived.

XIV. *Thirdly*, When we are certain that he with whom we Discourse will not only not be offended, though his Judgment be for that time imposed upon, but on the contrary will be thankful for it, on account of the Advantage, that he shall get by it. Thus a Lye strictly taken, that is an injurious Lye, cannot be reputed a Crime, no more than he can be charged with Theft, who with the Owner's free Consent spends something of his, to obtain him a greater Profit. For in Cases of certain Advantage, a presumed Consent is as Authentick as one express'd, *but there can be no wrong done to him, that is willing*. Wherefore a Physician is not supposed to Lye, when he comforts his dejected Patient, as *Arria* did *Petus* upon the Death of their Son, which Story is in (dd) *Pliny's* Epistles; or he that in a Danger encourages the Soldiers with brave, though false News, whereby he occasions their Safety and Victory; and so the deceived is not catched, as *Lucretius* speaks.

And *Democritus*, ἀληθομυθεύειν χρεόν, ὅπερ λαΐον, *We must speak Truth, when it is for our Interest*; and *Xenophon*, φίλος δίνουεν θραπατᾶν, ἐν ᾧ ἀγαθόν, *It is lawful to deceive our Friends, for their Advantage*; and *Clemens Alexandrinus* allows, ψεύδεσσι τοῖς θεραπεύειας μέρει, *To use a Lye for a Security or Remedy*: So *Maximus Tyrius*, καὶ τῶν νοσούντων θραπατᾶ, καὶ στρατηγοῦ στρατόπεδον, καὶ κυβερνήτης ναύτας; καὶ δεινὸν εἶναι, *The Physician deceives his Patient, the General his Soldiers, and the Pilot his Mariners, and yet no injury*. And *Proclus* in *Plato* gives this Reason, τὸ γὰρ ἀγαθὸν χρηττέον ὅσι τὸ ἀληθείας, *That which is good, is preferable to that which is true*. The like we have in

in *Xenophon* (e), that their Confederates were coming to their Assistance; and of *Tullus Hostilius*, that he ordered the *Alban Army* to be surrounded; and that *Salubre Mendacium*, that *wholsom Lye* of *Quinctius* the Consul (as Historians call it) to encourage his Army, gave out, that his left Wing had routed their Enemies; and of many others. But we must observe, that the Injury done to the Judgment in this Case, is of less concern, because it is but as for a Moment, and the Truth immediately appears.

XV. *Fourthly*, The nearest to the former is this, as often as he who (f) has an Absolute Right over all the Rights of another, makes use of that Right, either for his own particular Advantage, or for the publick Good. And *Plato* seems to have respect to this, when he allows Princes the Liberty to speak false. And yet when he sometimes grants, and sometimes takes away this Privilege (g) to, and from Physicians, he seems to make this Difference, that he gave it to the publickly Authorized ones, and took it away from the Quacks and Mountebanks. Yet the same *Plato* does justly acknowledge, that it is not allowable for God to Lye, notwithstanding the Sovereign Power that he has over Men, because it is an Argument of Weakness to fly to such Shifts.

XV. And when he that speaks, uses that Sovereign Power that he has over his own Subjects.

An

(e) In *Xenophon*.] And when *Agésilas* came into *Beootia*, and there understood that *Pylander* was vanquished in a Sea-fight by *Pharnabazus* and *Conon*, he published the contrary in his Army, and putting on a Crown, offered Sacrifices for the Victory. *Plutarch* in the Life of *Agésilas*.

(f) He who has an Absolute Right.] *Agamemnon* the Grecian General, in the 2d *Iliad*: *ἡρώτα δ' ἐγών*, &c.

I'll first by Artful Words 'tis highly Just to do it)
Persuade 'em, soon to make off with the Wealthy Fleet.

(g) To, and from the Physicians.] *St. Chrysostom* instances in Physicians in the said B. 1, *de Sacerdot*.

An Example of this perhaps innocent Falshood we have (b) in *Joseph*, and commended by *Philo*, who being Viceroy pretends, tho' against his Knowledge, to charge his Brethren, First, with being Spies, and afterwards Thieves. And in *Solomon*, who gave a remarkable Demonstration of his Divine Wisdom, when to discover the true Mother, he commanded the living Child to be divided, when he intended nothing less; 1 *King*. iii. 26, 27. True is that Saying of *Quintilian*, Sometimes the common Good requires, that some Falshoods should be maintained.

XVI. Or perhaps, when the Life of an Innocent Person, or something equal to it, cannot otherwise be preserved.

XVI. Fifthly, (i) When the Life of an Innocent Person, or something equal to it, cannot otherwise be preserved, or the Execution of a dishonest Act be otherwise prevented; as was the Fact of *Hypermnestra*, commended by *Horace*.

*Splendide mendax, & in omne Virgo
Nobilis ævum.*

*A Virgin (k) famous for her Pious Lye,
Whose glorious Memory shall never die.*

XVII. Some

(b) In *Joseph*.] With the Severity of a Governour, he charged his Brethren with being Spies, says *Cassiodore de amicitia*.

(i) When the Life of an Innocent Person, or something equal to it, cannot otherwise be preserved or the Execution of a dishonest Act be otherwise prevented.] *St. Austin* on the 5th Psalm, related by *Gratian* in *Caus.* 22. quest. 2. c. *nequis*, There are two sorts of Lyes, not much to be blamed yet not wholly blameless, when we either jest, or tell a Lye to serve our Neighbour. The jocular one is not pernicious, because it does not deceive, for he to whom it is directed, knows it was spoken in Jest. And the other, the Officious Lye, is the less Faulty, because it has in it something of Kindness (or Charity). *Tertullian* in his Book *de pudic.* among our daily Sins of Infirmity, to which we are all subject, puts also this, to Lye out of Necessity.

(k) Famous for her Pious Lye.] The Commentator says decently; for it is a brave thing to Lye for Justice; like to that of *St. Chrysostom*

XVII. Some Wise Men think, that we may use Falshood in a larger Sense to an Enemy, than what I have mentioned; thus *Plato* and *Xenophon* among the *Greeks*, *Philo* among the *Jews*, and *St. Chrysostom* among (1) the *Christians*, to the Rules given for Lying, add this Exception, Unless it be against our Enemies. Hither we may perhaps refer that Message sent by the Men of *Jabesh Gilead* to the *Ammonites*, by whom they were besieged, 1 Sam. ii. 10. And that of (m) *Elisha* the Prophet, 2 Kings vi. 19. as also that of *Valerius Levinus*, who boasted that he killed *Pyrrhus*.

To the *Third*, *Fourth*, and *Fifth* of the Observations above mentioned, we may refer that of *Eustratius* Archbishop of *Nice*, ὁ εὖ βουλευόμενος ἐν ἡ ἀνάγκῃς ὁ ἀληθεύων ὅστιν. ὅτι γὰρ ποτε τ' ὀρθῶς, βουλευόμενος καὶ πρὸς αὐτὸς τὸ ψεῦδος βουλευσάμενος, ἐν ἐπιτηδείοις ψευδῶν πρὸς τινὰ ἢ ἐχθρὸν ὄντα, ἵνα σφαλῇ αὐτὸν φίλον ἐν ἐκκλήσῃ αὐτὸν ἀπὸ κακῆς, καὶ τῶν τὰ παραδείγματα ἐν τῇ ἰσορροπίᾳ πολλὰ, There is not always a necessity, that a good Counsellor should speak Truth; for possibly a good Counsellor may consult

XVII.
That it is
lawful by
speaking
false to de-
ceive an E-
nemy, by
whom as-
serted.

on *Rahab*. O beautiful Lye! O laudable Deceit! not of one that betrayed divine things, but that preserved true Piety; and *St. Austin* of the *Egyptian* Midwives, O brave Invention of Humanity! O pious Lye to save Life! *St. Jerom* also commends those Midwives, and the Rewards given them. which he also believes to be Eternal, upon *Ezekiel* xvii, and *Isaiah* lvi, and *St. Ambrose* on *Syagrius* Book 6. *St. Austin* himself, changing (as he uses) writes to *Consentius* against a Lye, c. 15. *Tostatus* says there is no Sin in it. And *St. Austin* doubts of it, B. 2. quest. super Exod. and *Thomas* 2. 2. quest. 90. art 55. ad. 4. and also *Cajetan*. See at your leisure. *Erasmus's* *Moria Encomium*. and the most learned *Masius* upon *Joshua* 2. 5.

(1) Among the *Christians*, *St. Chrysostom*.] speaking thus, If you examine the most noblest Captains, you will find most of their Triumphs due to Fraud, and that they are more commended, than those gained by manifest Valour.

(m) Of *Elisha the Prophet*.] There is another of the same *Elisha* like to it, 2 Kings viii. 10.

how he may designedly tell a Lye, whereby either to deceive his Enemy, or save his Friend for harm. Examples of these kinds are common in all Histories. And Quintilian, If a Highwayman may lawfully be diverted from killing a Traveller, or an Enemy deceived to preserve our Country, then what is blameable in a Servant, is commendable in a wise Man.

I know the Schoolmen of some Ages past will not allow of this, who out of all the Primitive Fathers have generally chose (n) St. *Austin* for their Guide in almost all things; yet tho' they are scrupulous of admitting false speaking in any Case, yet they allow of Tacit Interpretations; so that it is doubtful, whether it be not better to admit of False speaking to some Persons, in the forementioned Cases, or some of them (for I do not here pretend to determine any thing) than so indifferently to distinguish them from Falshood, as when they say *I know not*, they mean, *I know not how to tell you so*: Or, *I have nothing*, they mean, *I have nothing to give you*; and many such like, which even common Sense is ashamed of; and which if allowed, will quickly introduce plain Contrarieties; so that he that affirms any thing may be thought to deny it, and he that denies a thing, may be said to affirm it.

For it is very true, that there is no word (o) but may admit of a double Interpretation, because every word, besides the Signification, which is of its

(n) St. *Austin*.] Against whose last Sentence upon this Subject, wrote *Rupertus* the Abbot.

(o) But may admit of a double Interpretation.] *Chrysippus* maintains in *Gellius*, B. 9. c. 12. and *Seneca de Benef.* 2d. c. 34. There are a vast Number of things without Name, which we do not give the right Denominations to, but strange borrowed ones.

its first Acceptance, (p) has also another of the second, and that divers (q) according to the diversity of Arts, and also others from Translations, and agreeable Figures. Neither do I like their Device better, who, as if they quarrell'd more with the word, than the thing, call that Jest, which they speak with a Countenance and Pronunciation very Serious.

XVIII. But we must observe, that what we have here said concerning false speaking, is to be referred to Assertory (or Affirming) Speech, (and that too so far only, as to hurt no Body, but a publick Enemy) (r) but not to Promissory. For every Promise (as I said before) confers a new, and special Right to the Person promised: And this is in Force even among Enemies, notwithstanding their open Hostility, and that not only in express Promises, but also in Tacit ones, as in beating of a Parly, of which we shall treat more hereafter, when we come to speak of publick Faith to be preserved amongst Enemies.

XVIII.
This is not
to be extended
to words
Promissory.

XIX. Neither is it to be extended to Oaths, either Assertory, or Promissory, for Oaths have a Power to exclude all Exceptions which may arise from the Party we deal with, because therein we Treat not only with Men, but with God, to whom we stand obliged by our Oaths, tho' there should arise no Right at all to Man: For (as I have said already) it is not so in other Speeches, as those

XIX. Nor
to Oaths.

(p) Has also another of the second.] St. Austin de mag. That we have found out no sign, which among the other things that it denotes, does not also signifie it self.

(q) According to the diversity of Arts.] See what has been already observed upon the tenth Paragraph.

(r) But not to Promissory.] Agesilaus in Plutarch distinguishes thus, To break Leagues, is to despise the Gods; but otherwise to deceive an Enemy with words, is not only just, but glorious, and a Pleasure with Profits.

those confirmed by Oath, for in others it is enough to clear us of a Lye, if the words be true in any Sense, not altogether unusual; but in things sworn it is necessary that our words be plain, and fitted to that Sense, and obvious to the Understanding of those, to whom we swear; so that we perfectly abhor their Impiety, who scruple not to affirm, that it is as lawful to deceive Men with Oaths, as Children with Toys.

XX. Is it more generous to Christian Simplicity to abstain from falsehood even to our Enemies, Illustrated.

XX. We know there are some Kinds of Fraud, which tho' naturally permitted, yet are rejected by some People and Persons, not so much on the Account of any Injustice in them, as out of either a Greatness of Spirit, or sometimes a Confidence of our own Strength. There is in *Ælian* a remarkable Saying of *Pythagoras*, That Man comes near to God in two things, in always speaking Truth, and in doing Good to all Men. And in *Jamblicus*, Truth is the Guide to all Virtues, both Moral and Divine. And in *Aristotle*, ὁ μεγαλόψυχος παρρησιαστικός, καὶ ἀληθευτικός, A Man of a Great Soul delivers himself with Freedom and Truth. And in *Plutarch*, τὸ λευδέα δ' ἀλοπραπείη, (f) It is base and servile to Lye. And *Arrianus* of King *Ptolemy*, καὶ αὐτῷ βασιλεῖ οὐτε ἀιχρότερον ἢ τῷ ἄλλῳ ψεύσασθαι ἦν, It is much worse in a King to lye, than in another. So the same Author of *Alexander*, εἰ χρῆναι τὴ βασιλίᾳ ἄλλο τι ἢ ἀληθεύειν, πρὸς πᾶσι ὑπηκόοις, A Prince should speak nothing to his Subjects, but Truth. And *Mamertine* speaks of *Julian*. Admirable is the agreement between our Prince's Tongue, and his Heart; he is sensible that lying argues a base and mean Spirit, and is a servil Vice; and whereas fear or want makes Men

(f) It is base and servile to Lye.] *Philo* in his Book. that every good Man is free; whence they that are trickish and deceitful, are usually said to be of a base, and dissingenuous Spirit.

Men Lyars, so is that Prince ignorant of his own Majesty that Lies. Plutarch records of Aristides, Φύσις ἰσχυρὴν ἐν ἡβῇ βεβαίω καὶ πρὸς τὸ δίκαιον ἀτενής, *ἦν δ' ἐν παιδείᾳ τινὶ τέρπῳ περιεμμένη.* He was naturally so great an Admirer of Truth, that he would not allow of a Lye in Jest. And Probus of Epaminondas; So great a Lover of Truth, that he would not tell a Lye, though but for Sport. Which ought the more religiously to be observed by Christians, who are not only commanded to use Simplicity, *Mat. x. 16.* but are also forbidden idle Talk, *Mat. xii. 36.* Having him for an Example, in whose Mouth was found no guile. Wherefore (as Lactantius said) He that is truly honest and just will not say with Lucilius, *Homini amico ac familiari non est mentiri meum,* It is not my Custom to tell a Lye to my Friend; but also will think it his Duty not to Lye to a Stranger, or an Enemy, nor do that thing that may cause his Tongue to speak what his Heart does not think. Such a one was Neoptolemus says Sophocles, *ὑπερβάλλον ἀπλότητι, καὶ ἐνγενεῇ,* Excelling for his Veracity and Noble Blood; as Dion Prusænsis rightly observed, who being urged by Ulysses to use Treachery, reply'd,

*I grieve to hear your secret Treacheries,
But should do more to act, as you advise.
(*) If I (Ulysses) were not nobly Born,
I yet should base, unmanly Actions scorn:*

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But

(*) If I Ulysses.] Of whom Horace. *Carm. B. 4. Ode 6.*

Ille non, &c.

Not He in great Minerva's House
Had Cheated Troy and Priam's headless Court

Dispar'd

*But it would ever shame Achilles Son,
To steal by Craft, what should by Force be won.*

And Euripides.

*A Gallant Soul will Gallant Actions do,
And scorns by Treachery to kill his Foe.*

Thus *Alexander* said, he would not Steal a Victory; and *Polybius* writes, that the *Achæans* hated to use Fraud against an Enemy, esteeming that the surest Victory, which, to use *Claudian's* Words,

— *Confessos animo quoque subjugat Hostes.*

A Victory confess'd by Enemies is true.

So were the *Romans* till the second *Punick* War, so that *Ælian* said, Ἰσασι Ῥωμαῖοι ἀγαθοὶ εἶναι καὶ μὴ διὰ τέχνης καὶ ἐμπροσθεν καταγωνισαδὲ τὰς ἐχθρας. *The Romans are truly Valiant, overcoming their Enemies, not by Craft and Subtilty, but by plain Force.* And when *Perseus* the *Macedonian* King was deceived by the Hopes of Peace, the old Senators disallowed the Act as inconsistent with *Roman* Bravery, saying that their Ancestors professed

Dissolv'd in Wine and Sport;

But Hot and Deaf to all Remorse,

Had fiercely storm'd our Walls with open Force.

Creuch.

And what follows; Where the Commentator says, that *Achilles* achieved nothing by Deceit, but plainly by true Valour. Observe that Confidence of his Valour, which well agrees with what we have said in the Context at the beginning of this Paragraph.

cuted their Wars by Valour, not Craft, not like the subtil *Carthaginians*, nor cunning *Grecians*, among whom it was greater Glory to overcome their Enemies by Treachery, than by true Valour. To which they added: *That sometimes Cunning might for a little while prevail against Valour, but his Courage was for ever lost, who was convinced that in a pious and just War, he was neither by Fraud, nor by Chance, but engaging closely in Battle with his whole Strengths fairly vanquished.* So in later Times we read in *Tacitus*, *That the Roman People avenged themselves on their Enemies, not by Craft or Cunning, but openly and by Force of Arms.* Such also were the *Tibarenes* (a People of *Cappadocia*) who always proclaimed the Time, and Place of Battle. The like does *Mardonius* in *Herodotus* testifie of the *Grecians* in his Time.

XXI. As to the manner of prosecuting a War, this Rule is necessary, (u) that whatsoever is unlawful for a Man to do, is also unlawful for another to force, or perswade him to. As for Example, it is unlawful for a Subject to kill his Prince, or to deliver up a Town without the Consent of a Council of War, or to Plunder his Country-men. Therefore it is also unlawful to perswade him, who continues a Subject to do so; for he that causes another to Sin, always Sins himself; neither is it enough to say, that it is lawful for him, who tempts another to a base Act, to do it himself, as to kill an Enemy suppose, he may kill him, 'tis true, but not in such a manner. And *St. Augustine* says true, *It signifies nothing, whether*

XXI. *That it is not lawful for us to Force another to do what is lawful for us to do but not for him.*

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(u) *Whatsoever is unlawful for a Man to do, it is also unlawful for another to force, or perswade him to do it.* So also *Maimonides* teaches, הלכות חורבן Chap. 5. Sect. 10.

a Man commit a Crime himself, or employ another to do it for him.

XXII. *Yet we may use his Service, that freely offers it.*

XXII. But it is another thing, if a Person shall freely offer himself, without any Perswasion to it; for it is not unlawful for us then to make use of him as an Instrument to do that, which it is lawful for us to do. As we have proved already (x) by the Example of God himself. *We receive a Defetter by the Law of War, said Celsus*, that is, it is not contrary (y) to the Law of War, to receive him, who quitting the Enemies Party, embraces Ours.

CHAP. II.

How Subjects Goods, by the Law of Nations, are obliged for their Prince's Debts: And of Reprisals.

I. *Naturally no Man is bound by the Fact of another but the Heir.*

I. I. **L**ET us now come to those Rights, which the Law of Nations allows us, which partly belong to every War, partly to some particular kinds of War only. Let us begin with Generals. By the bare Law of Nature no Man is bound by the Fact of another, but he that inherits

(x) *By the Example of God himself*] B. 2. c. 26. § 5.

(y) *It is not contrary to the Law of War, to entertain him, who quitting the Enemy's Party embraces ours.*] Neither are we to deliver them up, unless it be so stipulated by the Articles of Peace, as in the Peace, with Philip, the *Ætolians*; *Antiochus*; Polyb. in excerpt. Legat. 20. 28. 35. Menander protect. is of the same Opinion.

rits his Goods. (a) For when Dominion was first introduced, it was then agreed on, that all Debts should pass together with the Goods to the next Possessor. The Emperor Zeno used to say, that it was contrary to natural Equity, that one Man should be troubled for another Man's Debt. Here arise those Titles in the Roman Laws, That a Wife shall not be sued for the Husband; nor the Husband for the Wife; the Son for the Father; nor the Father or Mother for the Son.

2. Neither (as Ulpian says expressly) shall particular Persons be obliged for the Debts of the State, that is, if the publick Stock be able to discharge them; otherwise they shall be, not as particular Persons, but as they are part of the whole. Seneca says, *If any Man lend Money to my Country I shall not own my self his Debtor, nor take it as my own Debt, (b) but shall willingly pay my Proportion to discharge the Debt.* And again, *As one of the People not as for my self I shall pay, but advance it for my Country.* So again, Every particular Person owes, not as his own Debt, but as part of the Publick. Hence it was particularly provided by the Roman Laws, that no Peasant should be obliged for the Debts of another Peasant; and in another Place, that no ones Possession should be distrained for the Debts of another, nor even for the Publick; and in Justinian's Novels, *οὐκ ἐν ὑποθήκῃ*, Reprisals (c) are expressly forbid; giving this Reason for it, because there is no man-

D 3 ner

(a) For when Dominion was first introduced it was then agreed, that all Debts should pass together with the Goods to the next Possessor.]

See above, B 2. c. 21. § 19. Add c. in lit. de raptor. c. tua de usur.

(b) But shall willingly pay my Proportion to discharge the Debt.]

See the Sicilian Laws in the End of the 1st Book.

(c) Reprisals.] C. unico de Injur. in 6to pignorationes, which the vulgar Version calls Repressalias you may rather say as some Books, Reprensalias, for that exactly answers to the Saxon word *Wibbernam*, but the other word is more used.

ner of Reason for it, that one Man should be the Debtor, and another be forced to pay the Debt: where also such Exactions are called Odious. And *Theodorick in Cassiodore* called it a base License, for one Man to be kept as a Pledge for another.

II. But by the Law of Nations, the Goods and Acts of Subjects are obliged for their Princes Debts.

H. 1. Though this be true, yet by the voluntary Law of Nations, it may be, and as appears has been introduced, that whatsoever Debts any Civil State, or the Prince shall contract, either primarily by themselves, or be engaged for by not restoring to others what is their right; all the Goods both Corporal, and Incorporeal of their Subjects, shall be obliged to discharge. But this was occasioned by a kind of necessity, otherwise there would be such a Loose given, as to let in all manner of Injuries, for the Goods of Princes cannot so easily be seized upon, as those of private Men, who are in number more. Wherefore *Justinian* reckons it among those Laws which Custom has thought necessary to be enacted for the Relief of Human Necessity.

2. Neither is this so disagreeable to Nature, that it might not be brought in by Custom, and the tacit Consent of Nations, since Sureties stand obliged for other Mens Debts, without any other Cause than their own free Consent. And it is very probable, that the Members of the same Society may more easily relieve one another, than Strangers can, whose Complaints are little regarded in many places. Besides, the Benefit arising from this Obligation, being common to all People, they that find themselves grieved by it at one time, may be relieved by it at another.

3. Nor is this Custom only prevalent (d) in compleat Wars between Nation and Nation (for what is

(d) In Compleat Wars.] The learned *Nicolaus Damascenus* distinguishes Wars from these Reprisals, where he shews, that (tho' it were

is allowable in such Wars, the very words of the Denunciation declare) *Against the ancient Latin People, and the Men of old Latium, I denounce and make War*, says the Herald in *Livy*. So when he demands the Peoples Consent, *Is it your Will and Pleasure that War shall be proclaimed against King Philip, and the Macedonians, and all under his Dominion?* And in the Decree it self, *The Roman People do denounce War against the Hermundulian People, and the Men of Hermunduli*, which is out of *Cincius* in his *Res Militaris*. Also in another place, *Let him be an Enemy, and all that are under his Protection*. But where no perfect War is absolutely denounced; yet where a certain violent Prosecution of our Right is necessary, which is as it were in an imperfect War, this Custom is also necessary. *Agessilaus* formerly told *Pharnabazus*, Subject to the King of *Persia*, ἡμεῖς, ὦ Φαρνάβαζε, ὅτε φίλοι ὄντες πρῶτερον Βασιλέως, ἐχρώμεθα τοῖς ἐχθροῖς πολεμικῶς φιλικῶς. καὶ νῦν πολέμιοι γεγονότες, πολεμικῶς ἐν ἑν καὶ σε ἑ, βασιλέως κλημάτων ὁρῶντες εἶναι βεβλόμενον, ἐκόντως δια σὲ βλάπτομεν ἐκείνον, *When (O, Pharnabazus) we were heretofore Friends to the King, we dealt friendly to all that belonged to him; but now being his Enemies, we shall use them all as Enemies; and therefore since you resolve to continue one of his, we shall endeavour to hurt him through you.*

III. I. A Branch of the Execution of this Right is, what the *Athenians* called ἀνδροληψίαν, *taking*

III. An Example in taking of Men Prisoners.

D 4

were not lawful for *Herod* to make War upon the *Arabians*,) he might yet ῥύσια λαμβάνειν, take Reprisals, for Debts due unto him by Contract, *Josephus* 6. *Antiq. Hist.* where he has these words, *Saying that there were 500 Talents due to Herod, and a Caution thereby given, if the appointed Day of Payment were passed, he might take Prizes out of all Arabia; he therefore called this Action, not a Warlike Expedition, but a just way to recover his own Due.*

taking of Men Prisoners; concerning which the Attick Law was this, *ἐάν τις βιάται θανάτου ἀποθάνῃ, ὑπὲρ τῶν τοῖς προσηκόντων εἶναι τὰς ἀνδροφιλίας, ἕως ἂν ἡ δίκας τῷ φόνι προχωροῖν, ἢ τὰς ἐποκτείναντας ἐκδώσι* ἢ δὲ ἀνδροφιλίαν εἶναι μέχρι τριῶν, πλεον ὃ μὴ. If any Man was found murdered, the next of kin had a Right to take any three Men, and no more, and to detain them 'till the Murderer were either punished, or delivered up in order to it. Hence we may see, that there is a kind of incorporeal Right of Subjects, (that is, a Liberty to live where they please, and to do what they please) engaged for the Debts of every Society, which ought to punish such of their own Body, who shall injure those of another Society; so that if any of the Members thereof shall neglect to do it, they may be held in Bondage 'till the Society punish the Offenders. For tho' the Egyptians (as we learn out of *Diodore*) did maintain, that it was not just to imprison a Man for Debt, yet there is nothing in it contrary to Nature; and the general Practice, not only of the Grecians, but also of other Nations, is enough to defend the contrary.

2. *Aristocrates*, who was Contemporary with *Demosthenes*, demanded that a Decree might pass, that whosoever should kill *Charidemus*, might be killed where-ever he was met with; and whoever made Resistance, should be held as an Enemy. In which *Demosthenes* finds these Faults. First, That *Aristocrates* did not distinguish the killing *Charidemus* justly, or unjustly, since it was possible to have been justly. Next, That he did not require that Judgment should first be demanded against him. And thirdly, That not they among whom he should be killed, but they that protected the Murderer, should be reputed as Enemies. The words of *Demosthenes* are these, ὁ μὲν νόμος, ἀν

μήτε

μητε δικας ἀποχωσι παρ οἷς ἀν τὸ πάθος γένηται,
μητε τὰς δειδομένους ἐκδιδῶσι, κελύει καὶ τῶν
εἶναι τὸ ἀνδροληψίον καὶ τρωῶν, ὃ ὅτε μὴ ἀδύνατος
παρῆκε, καὶ εὖ δὲ λόγον πεποίηται πρὸς αὐτῶν εὐδυνα,
τὰς ὅτι ἡδὲ πεφευγότα, φήσω ὅτι ἔγω, καὶ τὸ κοινὸν
ἀνθρώπων νόμον, ὃς καὶ τὸ φεύγοντα δέχεται ἀποδιδόναι
ἐκδοῦναι ἐκποδόντας εἶναι γὰρ εἰάν μὴ τὸ ἐκείνην
ἐκδοτὸν δίδωσιν, *If a Murder be committed a-
mong any People, and they refuse either to punish,
or deliver up the Murderer, the Law allows us to
seize on three Men; but he (Aristocrates) leaves
these Men untouch'd, and does not so much as mention
them, but would have those prosecuted as Enemies,
who have, according to the common Right of Nations
concerning Suppliants, received him that has fled to
them for Protection, (for so I put the case) unless
they deliver him up. The fourth thing that he
finds fault with is, That Aristocrates would im-
mediately bring it to a direct War, whereas
the Law only demands the taking up of three
Men.*

3. Of these four Exceptions, the first, second, and
fourth are reasonable, but the third, unless con-
fined to the sole Event of the Murder done, ei-
ther Accidentally, or in his own Defence, I can-
not see why it should be mentioned, unless it were
like an Orator for Argument's sake, rather than
truly and justly; for (as we said before) that
Right of Nations to receive and defend Suppli-
ants, does only concern them only, whom For-
tune, not their own Crime, has made misc-
rable.

4. Otherwise there is the same Law for those
among whom the Crime was committed, as for
them who refuse either to punish or to deliver up
the Offender. And therefore, either the Law it
self, cited by *Demosthenes*, has been thus inter-
preted through Custom, or was afterwards more
clearly

clearly exprest against such idle Objections. No Body will deny the truth of one of them, who has read that of *Julius Pollex*, ἀνδρλήψιον ὃ ὅταν τις τὸς ἀνδρφόνας καλαφυγόντας ὡς τινὰς ἀπαιτῶν μὴ λαμβάνῃ ἐξέσιν ἐκ τῶν ἐκδοσόντων ἄχρι τῶν τεσσάρων ἀπαγαγῶν, *The seizing of Men is then lawful, when a Man having demanded Murderers who have fled to others for Refuge, cannot receive them; for the Right of Apprehending three Men, is against those that refuse to deliver up the Delinquent.* And so *Hippocraton*, ἀνδρλήψια τὸ ἀρπάζειν ἀνδρας ἐκ τινὸς πόλεως. ἐνεχυράζον γὰρ τῷ ἔχουσιν πόλιν τὸ ἀνδρφόνον, καὶ μὴ προδιδόντων αὐτοῖς τιμωρίαν, *The Right of taking Prisoners, is to snatch away some Men from another City: For against such Cities, who received Malefactors, and refused to deliver them up to Punishment, they anciently used this Right of Reprisal.*

5. The like may be done by any City, whose Citizen has been manifestly and injuriously taken away and detained. So at *Carthage* some opposed the taking *Ariston* the *Tyrian* Prisoner, upon this account, *That the like would be done against the Carthaginians, both at Tyre, and in other trading Towns, where their Business called them.*

IV. And in seizing their Goods

V. Which is lawful when our Right is first denied, and when that is where is also shewed, tho' the thing be adjudged, yet it neither gives, nor takes away any Man's Right.

IV. Another kind of forcible Execution is ἐνεχυρασμός, (e) *Reprisal among divers Nations, called so by our Modern Lawyers, which the Saxons and English call Withernam, and the French, even where it used to be obtained from the King, Letters of Mark, and are of Force (as Lawyers say) where Right is denied.*

V. 1. Which may be supposed, not only when Judgment cannot within a reasonable time be obtained against a Malefactor, or a Debtor, but also in

(e) *Reprisal among divers Nations.*] *Demosthenes* calls it Σύλας, Prizes, in *Orat. pro cor.* and *Aristotle* in his 2d *Oeconom.*

in a case that will hardly admit of any doubt, (for in doubtful cases the Definitive Power is presumed to be in the Delegates) Sentence shall pass plainly against Right. For the Authority of the Judge is not of the same Force against Strangers, as Subjects: Nay, even between their own Subjects, it does not make void a just Debt. For (as *Paulus* the Lawyer observes) *A real Debtor, tho' he be discharged by the Judge, (f) yet by the Law of Nature still continues a Debtor; and when by the Injury of the Judge, a Creditor had taken away something from the right Owner, that had not been the Debtor's, as if engaged to him, the Question being put, whether the Debt being paid, that thing should be restored to the Debtor, Scævola proved that it should.* Here is the difference; Subjects are bound up by the Sentence of the Judge, tho' it be unjust, so as they cannot oppose the Execution of it lawfully, nor by Force recover their own Right, for the Efficacy of that Power under which they live: But Strangers have a coercive Power, tho' it be not lawful to use it, whilst they may recover their Right in a judicial way.

2. Therefore in such a case, that both (g) the Persons and Moveables of his Subjects, that refuses to restore what is violently taken away, may by the like Violence be taken, is not introduced by Nature, but generally received by Custom. We have a very old Example of this in *Homer's Iliad*, λ 11. where *Nestor* is said to drive away the Cattle of the *Eleans*, because they had before plundered

(f) Yet by the Law of Nature still continues a Debtor.] To this purpose we find in *Gaius de pace pub. b. 2. c. 8. num. 7.* & *Vasquius b. 4. controu. illustr. cap. 10. § 41.*

(g) Both the Persons.] See an Example in *Ammianus. b. 17.* where *Julian* seizes some of the French, 'till the Prisoners, according to Agreement, were released. And also *Leo Afer, b. 3. de Monte Berrigualid.*

dered his Father's Horses, *ῥυοὶ ἑλαυνόμενοι*,
 (b) taking them by way of Reprisal; where *ῥύσια* is
 expounded by Eustatbius; *τὰ ἀπὸ τινῶν ῥυομένη, ὅ
 ἔστιν ἐκ ἀλλήλων ἢ ἀπὸ τῶν περὶ αὐτῶν ἀρπαζομένη*
Things taken in lieu of others, that is, seized, and
carried away to make amends for others taken from us.
 Whereupon, as the Story goes, Proclamation was
 made, that every Man to whom the *Eleans* owed
 any thing, should come, and take of the Spoil
 proportionably to his Debt, that is to say,

Μὴ τις οἱ ἀπεμβόμηναι κίοι ἴσῃς.

That no one might go without his just share.

Another Example we have in the *Roman History*,
 where *Aristodemus*, *Tarquin's* Heir, seized the *Ro-*
man Ships at Cumæ, for the Goods of the *Tar-*
quins detained at *Rome*, which *Halicarnassensis* says
 were Servants, Cattle, and Mony. And in *Ari-*
stotle in his second Book of *Oeconomicks*, we find a
 Decree of the *Carthaginians* to seize all foreign
 Ships, *ἢ τις σὺλαν ἔχει*, *If any carried Plunder.*

VI. This
 Right
 reaches not
 to the Life
 of him that
 is taken.

VI. It has also been believed among some Peo-
 ple, that the Lives of innocent Subjects stand en-
 gaged on the like account, and that perhaps up-
 on this Presumption, that every Man has an ab-
 solute Power over his own Life, and that it may
 be transferred to the State; which we have said
 elsewhere, is very improbable, and not consistent
 with sound Divinity. Yet it may happen, that
 Subjects may be killed, tho' not designedly, but
 accidentally; namely, while they attempt by Force
 to hinder the Execution of this Right. But if
 such

(b) Taking them by way of Reprisal.] You may find *ῥύσια* taken
 in this Sense in the Extracts of Legat. out of *Polybius* 38. concerning
 the *Achaens*, against the *Bæotians*, and Extract. 123. *ῥύσιαζεῖν*
 in *Diodorus Siculus* Extract. Manuscr. Pieres. but otherwise *ῥύσια*
καταγγέλλειν used in War, as we shall quickly speak of, cap. 3.
 §. 7. for they are very near alike.

such a thing may be foreseen, we are obliged by the Law of Charity to forbear the Prosecution of our Right, (as we have shewed in another place) since by that Law We Christians especially should set a greater Value upon the Life of a Man, than upon our Goods, as has been also shewed elsewhere.

VII. 1. Moreover in this, as in several other cases, we must take heed, that we distinguish between those things that are properly due by the Law of Nations, and those that are due by the Civil Law, or by mutual Agreements between some People.

VII. The Distinction herein between the Civil Law, and the Law of Nations.

2. By the Law of Nations all Subjects injurious to their Neighbours, are liable to this Law of Reprisals, especially if they continue to do so, whether they be Natives or Foreigners; but not if they be only Travellers, or sojourn there but for a little time. For these Reprisals are much of the same Nature with Taxes, which are introduced for the paying of publick Debts. Wherefore they are exempted from them, who only for a time are Subjects to the Law of the Place. Also the Persons and Goods of Embassadors by the Law of Nations, are excepted from this Payment, being not sent to our Enemies.

3. But by the Civil Law of Nations, the Persons of Women and Children use to be privileged, and even the Goods of Scholars and Merchants. By the Law of some Nations every thing whatsoever is liable to this Reprisal, as at *Athens* ἐν ἀνδροεργασίᾳ, as far as seizure of Persons. By the Civil Law of many Nations this Right of Seizure must first be desired of the Sovereign, in other Places from the Judges; By the Law of Nations the Propriety of things taken, does immediately extend to the value

value of the Debt and Charges, (i) the remainder to be restored; By the Civil Law, the Persons concerned therein use to be cited, and the Goods by publick authority sold, and delivered to them that are concerned in them. But in these and the like cases it is best to consult the Civilians, and especially *Bartolus*, who has written concerning Reprisals.

4. I shall add this because it helps somewhat to qualifie the Severity of this Law, in it self too rigid, viz. that they who either by not paying what they owe, or not doing right to injured Persons, have occasioned these Seizures, are bound by the Laws of God and Nature, (k) to make Satisfaction for those Losses, which others have suffered upon this account.

(i) *The remainder is to be restored.*] The Venetians were thus Just, having taken the Genoese Ships in Galata as Gregory relates, b. 9. But they did not in the least diminish any thing of the Goods in the Ships taken; their Lading was Wheat and Barly, and Salt for Fish, whereof the Lakes of Capais and Mixotis have great plenty, as also the River Tanais; but these they carefully preserved without lessening, till having received their Debt, they restored what they had taken entire.

(k) *Are bound to make Satisfaction for those Losses.*] Thus Plutarch (in the Life of Cinon.) of the Syrians. Many of them would not contribute Money, but commanded those, who either had then in Possession, or taken away other Men's Goods, to repair the Loss.

CHAP III.

Of a Just or Solemn War, according to the Right of Nations, and of its Denunciation.

I. 1. **W**E have (a) already just mentioned, that according to the Opinion of the best Authors, a War is often said to be Just, not from the Cause whence it arises, nor, as elsewhere, from the great Actions done in it, but from some peculiar Effects of Right. But what manner of War this is, is best understood by the Definition which the Roman Lawyers give of an Enemy. Pomponius says, *They are Enemies, who publickly denounce War against us, or we against them; the rest are but Pirates, or Robbers.* So says Ulpian, *They are Enemies against whom the People of Rome have publickly declared War, or they against the Romans; the rest are called pilfering Thieves, or Robbers.* Wherefore (b) he that is taken by Robbers, is not a Slave to those that take him, neither does he want Postliminy. But one taken by the Enemy, suppose by the Germans, or Parthians, is the Enemies Slave, and may recover his former Condition by the Right of Postliminy. And Paulus the Lawyer says, *They that are taken (c) by Pirates, or Robbers, continue free.* To which we may add that of Ulpian, *In Civil Dissentions, tho' by them the State be often wounded, yet it does not produce the Ruin of the State; they that embrace either Party, are not such terrible Enemies*

I. That a Solemn War by the Right of Nations, is to be between divers People.

(a) Already.] B. 1. c. 3. § 4.

(b) He that is taken by Robbers, does not become their Slave.] Hence the Argument of Plautus in *Panulus*, and of Terence in *Eunuchus*, and thus *Euans* Odyss. 15.

(c) By Pirates.] Pompey declared those that were taken by Pirates to be free, *Appian* *Mithridat*, add *Herrer*, Tome 2.

Enemies as they who have the Right of taking Prisoners, and of Postliminy, therefore they who are taken and sold, and afterwards recover their Liberty, have no occasion to Petition the Prince for their Freedom, having never lost it.

2. This only is to be observed, that under the Example of the People of Rome, whosoever has Sovereign Power in a City is to be comprehended. *He is an Enemy (says Cicero) who enjoys the State, a Court, a Treasury, the Consent, and Agreement of the Citizens, and if occasion require, some regard to Peace and Leagues.*

II. A distinction of a Nation doing unjustly from a Company of Pirates and Robbers.

II. 1. Neither does a State immediately cease to be a State, because some Acts of Injustice may be publicly committed by them; nor is a Company of Pirates and Robbers to be reputed an Incorporated Body, tho' perhaps they may observe some kind of Equality among themselves, without which no Society can long subsist. For these latter (*d*) are associated on the account of their Guilt; but the other, tho' sometimes not wholly guiltless, do associate for the Defence of their own Right, and to do Right to Foreigners, tho' happily not in all things according to the Law of Nature; which (as I have elsewhere shewed) among many Nations, is almost forgotten, yet still according to the Agreements which they have made, and the Customs by them used. This the Commentator upon *Thucydides* observes; whilst the *Greeks* allow'd Piracy they abstained from Murders, from Robbing in the Night, and from stealing plowing Oxen. And *Strabo* informs us, that other Nations, tho' they lived by Piracy, upon their return home, would

(*d*) Are associated on account of their Guilt. A Company of Men got together, not by Law, but for Injustice. *Procop. 2 Vandal.*

would send to the Owner, (e) that if they would they might redeem their Goods at a moderate Price; to which we may refer that of *Homer Odyss. E. 14.*

Kal μὲν ὑπομείνεις, &c.

In search of Prey to foreign Coasts they sail,

And if successful, then do with full Gale

Return unto their Country, fearing still

The Gods, that do regard both Good and Ill.

2. But in Morals, the Principal Part gives form to the whole: And as *Cicero* well observed in his 5th Book *de finibus*, *Because it contains the greatest parts, and spreads farthest, the whole is named from it*; to which agrees that of *Galen*, ἀπὸ τῆς πλεονεξίας ὅτι τῇ κρατοῦσι γινώσκουσι αἱ προσήγοροι. In mixtures the denomination is always taken from that which is the greatest Portion. The same Author often calls them ὀνομαζόμενα καὶ ἐκκράτηται, named from the most powerful. Wherefore *Cicero* was too severe in his Expression, in saying, when a King is unjust, the Nobles unjust, or the People, it is not properly a corrupt State, but none at all. Which *St. Augustine* thus corrects, *Neither can I therefore say that a People is no People, or the State no State, as long as there remains any Society of a rational Multitude, unanimously associated for the defence of the things that they love. A diseased Body is yet a Body, And a City, tho' grievously afflicted, is still a City, as long as it has Laws, and executes Judgments, and*

E

other

(e) *That if they would, they might redeem their Goods at a moderate Price.* So also were those whom *Saxo* mentions, B. 14. therefore *Plutarch* observes the *Syrians* to be grown worse with Time. When from of old they had Pirated upon the Seas, they at last did not spare those that came to Trade with them.

other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights. *Dion Chrysostome* is more in the right, who says that the Law (especially that of Nations) is in a City, as the Soul in a Human Body (f) for that being taken away it ceases to be a City. *Aristides* in his Exhortation to the *Rhodians* unto Peace, shews that many good Laws may be consistent even with Tyranny. And *Aristotle* says, he that stretches the Power of a few, or of the People too far, first corrupts, and then destroys the State. Let us illustrate this by Examples.

3. We have already declared the Opinion of *Ulpian*, that they who are taken by Robbers do not become the Captor's; but he says, those taken by the *Germans* lost their Freedom. Yet among the *Germans*, whatever Robberies were committed without the Bounds of any City, were not blamed; they are *Cæsar's* own Words. And *Tacitus* tells us, that the *Venedi* robbed in the Woods and Mountains of the *Peucini* and *Finlanders*. He also observes, that the *Catti*, a Noble People of Germany, practis'd Robberies. And again the *Lybians*, a Nation abounding in Robberies, and yet a Nation. The *Illyrians*, without distinction, used to rob by Sea, yet a Triumph was granted to their Conqueror, tho' it was denied to *Pompey* over the Pirates. So great a Difference is there between a Nation, tho' corrupted, and a Company of Villains confederated together to do Mischief.

III. Yet
sometimes
there hap-
pens a
Change.

III. Yet sometimes there may happen a Change, not only in particular Persons, as in *Jeptah*, *Arjates*, *Viriatius*, who from Captains of Thieves, became

(f) For that being taken away, it ceases to be a City. *Cicero* B. 1. Epist. 1. There are neither Laws, nor Judgments, nor any manner of Sign, or track of a State.

became lawful Commanders; (g) but also in Companies; as when a Company of Robbers leaving their wicked Practices, and following an honest Course of Life, become a Civil Society. *St. Augustine* says thus of Robberies, *If this mischief by a great concourse of desperate Men should grow so great, that they should seize on Places, raise Forts, build Cities, and subdue Nations, it then assumes the Title of a Kingdom.*

IV. We have already shewed who are they that have Sovereign Power, whence we may also gather, that he that hath it but for a part, may for that part make a just War; much more they who are not Subjects, (h) but unequally Confederates, as between the *Romans* and their Allies, (tho' upon unequal Terms) as the *Volscians*, *Latins*, *Spaniards* and *Carthaginians*, all the Wars were just, as we may learn from History.

V. But that this War be called Just, it is not enough that it is made between Sovereigns, but (as we have heard before) it must be publickly denounced, and that so publickly, that (i) both Parties may have equal Knowledge of it: Whence *Ennius* calls it Proclaiming of War. *Cicero* in his first Book of Offices observes, *To determine of the*

IV. It is required in a Solemn War, that he that make it have a Sovereign Power; and how that is to be understood.

V. And that it be solemnly denounced.

E 2

Equity

(g) But also in Companies; as when a Company of Robbers betaking themselves to an honest Course of Life, become a Civil Society.] We have an Instance in the *Mamertines*, *Diodorus Siculus* in his Fragments.

(h) But are unequally Confederates.] As the Duke of Lorrain in *Crantzius Saxen*. 12, 13. The City of *Straelsund* declared War against their *Pomeranian* Princes, the same *Crantzius Vandal*. 14. 35.

(i) That both Parties may have equal Knowledge of it.] *Josephus Antiq. Histor*. B. 15. to make War before it is proclaimed is unjust. See Examples of this Custom of Nations in *Crantzius Saxen*. 11. in *Orderbornius* in the Life of (*Johannes*) *Basilides*, B. 3. *Nicerius* blames the contrary dealing of the Turk with the *Olixaflani*, and of *Neumon* the *Servian*, B. 3. and 4.

Equity of a War, was a Right peculiar to the Heralds, sacred among the Romans, whence we are given to understand, that no War can be just, but what is made either for the Recovery of things unjustly taken away, or publickly denounced, and solemnly proclaimed. The Ancient Writer quoted by Isidore is not so clear, That War is just which is made by publick Edict, either for the recovering our own, or for repulsing the Enemy. Livy says, a Just War is that which is openly decreed by Publick Edict, and solemnly denounced. And having first declared, that the Acarnanians had wasted the Athenian Lands, says, the Athenians were at first intraged; afterwards by the Decrees of their Cities they voluntarily denounced, and then waged a just War.

VI. In denouncing what is required by the Law of Nature, what by the Law of Nations is handled distinctly.

VI. 1. For the better Understanding of this, and other Places, that treat of the Denouncing of War, we must carefully distinguish what things are due by the Law of Nature, and what are not by the Law of Nature, and yet are honest; and also what things are required by the Law of Nations to obtain the proper Effects of the Right of Nations; and lastly, what things do arise from the peculiar Laws and Customs of some People.

By the Law of Nature, where either Force is repelled by Force, or Punishment be demanded of him who is the Offender, there no denouncing of War is required. And this is what *Sthenelaidas* the *Ephorus* pleads in (k) *Thucydides*, & δίκαιος ἐὸν λόγους διαφύλαττα μὴ λόγῳ καὶ αὐτὸς βλαπτομένους, *There is no disputing with Words and Arguments,* when

(k) In *Thucydides*.] Also in B. 3. in the *Plataan Oration*, By the Rights allowed among all Nations, it is lawful to beat off an invading Foe; and *Flaminius* in *Diodorus Siculus*, in *Extract Peires*. He called all the Gods and Men to witness, that the War was begun by the King; add also that in *Mariana* 19. 13. of a War not proclaimed. See *Demippus* in *Extract de Legat*.

when our Injuries are so far beyond it. And *Latinus* observes in *Halicarnassensis*, τ' ἀρχόντα πολέμῳ πᾶς ὁ πρὸς παθὼν ἀμύνεται, Every Sufferer may drive off the Invader by War. And as *Ælian* out of *Plato*, That War that is made to beat away an Invader needs no other Herald but Nature it self. Hence *Dion Chrysostome* observes, πόλεμοι ὡς ἐπὶ τὸ πλεῖστον ἀκήρυκτοι γέγονται, Many Wars are made without denouncing. Neither does *Livy* blame *Me- nippus*, *Antiochus's* General, for any thing, but that he had killed certain *Romans*, no War being yet denounced, or any Hostility so far past, that they had heard of the drawing of a Sword, or any Bloodshed; thereby implying, that if either of these had been done, it might have justified the Fact. Neithes does the Law of Nature require, tho' the right Owner, being to recover his own, should first declare his design.

2. But as often as one thing is to be taken for another, or the Goods of a Debtor to be attached for a Debt, a Demand is requisite; much more when the Goods of Subjects are to be seized for the Debt of the Prince, whereby it is plain we have no other way to recover our own, or our Debt (*but by War*). For the Right which we have in those things is not Principal, but Secondary, and Substituted, as we have declared elsewhere. So a Sovereign ought not to be warred upon, either for the Debts or Offences of his Subjects, 'till Satisfaction has been legally demanded, the Denial of which renders the Prince also culpable, either by making him a Party in the Wrong, or by neglecting his Duty, according to what we have treated of before.

But where the Law of Nature does not require such a Demand to be made, (kk) yet it may be done

E 3

(kk) Yet it may be done honestly and generously.] See *Marianus* 27. 19.

done honestly and generously, so the end that Men may be more careful how they give Offence, or that That already given may be atoned for by Repentance and Satisfaction; according to those Rules which (1) I have already set down, for the preventing the Calamities of War, to which we may apply,

Extrema primo nemo tentavit loco.

No one at first will fly unto extremes.

Deut. 20.
10.

(m) And the Command which God gave the Hebrews, to offer Peace to a City before they fought against it, was peculiarly given to that People; and therefore by some ill confounded with the Law of Nations. Nor was that Peace offered as Absolute, but upon Condition of Submission and Tribute. When Cyrus had marched into Armenia, he forbore Acts of Hostility, till he had sent Ambassadors to the King, to demand his Tribute and Quota of Men, νομιζαν φιλικώτερον εἶ) εἶως ἢ μὴ προεπὶ πόλιν πορεύεσθαι, esteeming it (according to Xenophon) more friendly to act thus, than to go on without any Declaration, as Xenophon speaks in his History of that Action. But by the Law of Nations, a Public Denunciation is required in all Cases, as to those peculiar Effects of a just War, if not on both sides, yet on one.

VII. But

(1) I have already set down, for preventing the Calamities of War.]

B. 2. c. 23. § 7.

(m) The Command which God gave the Hebrews.] Josephus Antiq. Histor. 5. 2. But the Senate stops them, declaring that they ought not so suddenly to make War on their Countrymen, before they had remonstrated their Grievances, when the Law will not allow us to make War even on Foreign Nations that have injured us, till we have sent Embassadors, and tried all ways to bring the Offenders to Reason.

VII. But this Denunciation is either Conditional or Absolute. Conditional, when Restitution is demanded at the same time; but the Feical (or Herald) Law (n) under the Notion of things demanded, comprehends not only a Vindication of due by Right of Dominion, but also the Prosecution of it, whether due upon a Civil Account, or a Crime, as (o) Servius well expounds it. Hence we meet in the form of it these Words, *to be restored, to be repaired, to be delivered up*; where *to be delivered up* (as we have said in another place) is to be understood, unless they from whom they are demanded, shall chuse rather to punish the Offenders themselves. (p) Pliny declares, that this reclaiming of things was called a Proclaiming of War. A Conditional Denouncing of War is thus in Livy, *They are resolved with all their Power to revenge that Injury, unless redressed by the Offender.* And in Tacitus, *Unless they punish the Malefactor, they will put to Death without distinction.* And of this kind we have an old Precedent in Euripides, where Theseus orders his Heralds to tell Creon the Theban,

VII. War denounced sometimes Conditionally, and sometimes Absolutely.

(q) Your Neighbour Theseus friendly would obtain
A decent Burial for the Thousands slain.
If this you grant, then, Thebes, you may depend,
Theseus, as well as Athens, is your Friend.

E 4

(n) But under the Notion of things demanded: See Parva of the Cyprian War, B. 1. Bizar. B. 23. de Turcis Reimking, B. 2. Clasi. 3. c. 4.

(o) Servius] Upon the 10th Enid.

(p) Pliny] B. 23. 12. and Ambassadors when they were sent to the Enemies Clarigatum, with a loud Voice to demand Amends for Injuries done, one of them was called Verbenarius (i. e.) crowned with Vervin; and speaking of Vervin, B. 35. 9. he says it is that which shewed that Heralds use to carry to their Enemies. See Servius on the 9th and 10th Enid.

(q) Your Neighbour Theseus.] There is the same Denunciation in Batrachomyomachia, and in Plautus's Amphyrion in the beginning. See also Cræmerus 21.

*If not, prepare for War, to meet with those
Whom you have forc'd to be your deadly Foes.*

Papinius relating the same says,

Aut Danais edice rogos, aut praelia Thebis,

Grant Burial to the Greeks, or look for War on Thebes.

Polybius calls this *πρὸς ἀλλοτρίαν πόλιν*, to declare Reprisals lawful. The old Romans, *condicere*, to claim, or demand. A pure (or absolute) Denunciation, is what is especially called an Indiction (or *Præclamation*,) when either the other Party has begun the War (and this *Isidore* calls a War to repel an Enemy) or he himself (r) has done something that deserves to be punished.

2. Sometimes a Pure (and Absolute) Denunciation follows a Conditional one, tho' not necessarily, but over and above. Hence comes the usual Form, *I declare that Nation to be unjust, neither will they render what is right.* And another (s) of which Things, Differences and Causes, Declaration has been made by the King at Arms of the People of Rome, to the King at Arms of the Ancient Latins, and of the People of the Ancient Latins, that they have neither paid, given, nor done what things they ought to have paid, given or done; wherefore I judge, agree and declare, that Satisfaction be sought by a fair and just War. To which we will add a third Form, Because the Ancient Latin People have injured the People of Rome, and failed in their Duty, and because the People of Rome have commanded to make War against the Ancient Latins, and the Senate of the People of Rome have judged, agreed and resolved to declare War against the Ancient

(r) Or he himself has done something, that deserves to be punished.] See an Example in *Bembo*, B. 7.

(s) Of which Things, Differences and Causes.] Compare the Greek of *Dionysius Halicarnassensis* with the Extracts of *Legat.* 2.

Ancient Latins; therefore I and the People of Rome do denounce and make War against the Ancient Latins. But yet that the denouncing of War is not (as I have said) positively necessary, does appear from hence, that it is sufficient, if it be but proclaimed at the next Garrison. As the Heralds in the Case of *Philip of Macedon*, and afterwards of *Antiochus*, gave their Opinion, since he first denounces the War, that seeks Satisfaction in it. Nay, the word against *Pyrrhus* was denounced only to one of his Soldiers; and that in the *Flamini-an Cirque*, where that Soldier was ordered to hire a place, sent for Form-sake, as *Servius* observes on the 9th of the *Aeneids*. And this occasions a needless Observation, that War is often denounced on both sides, as that *Peloponnesian* by the *Corcyreans* and *Corinthians*, when on one side had been enough.

3. And this is an Argument, that the Observation is needless, when a Denunciation of War is made by both Parties, as the *Peloponnesian* War by the *Corcyrians* and *Corinthians*, when the denouncing of it by one would have been sufficient.

VIII. These things are done according to the Customs and Orders of some particular States, and not by the Law of Nations. (1) The Herald among the *Grecians* denounced War with *Varvain*, and a bloody Javelin used first by the *Aequi*; and from their Example by the *Romans*; there was a Renuntiation of all Friendship and Alliance (if ever there had been any) after thirty Days demand of Reparation, the Herald again (u) throw-

VIII. To denouncing War, what belongs to the Civil Law, and not to the Law of Nations.

(1) *The Herald among the Grecians.* You may learn the Original of a Herald cut of *Pliny* 29. 3. and *Servius* upon the 4th and 8th *Eneid*.

(u) *Throwing the Javelin or Spear.* See *Servius* upon the 9th *Eneid*. *Ammianus* 19. and the Notes of the Learned *Lindebrogius* upon him.

throwing the Javelin, and such like Ceremonies, which ought not to be confounded with those that properly belong to the Law of Nations. For *Arnobius* tells us, that many of these were left off in his time, and some disused even in *Varro's* Days. The third *Punic* War was both denounced, and made at the same time. And *Mecenas* in *Dion* will have some of these Ceremonies to be peculiar to Popular States only.

IX. War denounced against a Prince is denounced also against his Subjects and all his Adherents.

IX. War denounced against a Sovereign, is presumed also to be denounced against all his Subjects, Allies and Adherents. And this our Modern Lawyers mean, when they say, *A Prince being defied, all his Adherents are defied.* For to denounce War they call *diffidare*, to bid *Defiance*, which is to be understood of that very War which is made upon him against whom it was to be Proclaimed. Wherefore when the *Romans* had declared War against *Antiochus*, they would not do it separately against the *Ætoliens*, because they openly sided with him. The *Heralds* replied, *The Ætoliens have voluntarily proclaimed the War against themselves.*

X. But not by themselves considered, this illustrated by Examples.

X. But that War being ended, if any other Prince, or People, are threatned with an Invasion for having assisted in the War, we ought to denounce that War anew, to obtain the effects of a just War by the Law of Nations. For they are not then looked on as Accessaries, but as Principals; (x) wherefore it is well observ'd the War of *Manlius* against the *Gallo-Greeks*, and of *Cæsar* against *Ariovistus*, were not just by the Law of Nations: For they were

(x) The War of *Manlius* against the *Gallo-Greeks*, was not just by the Law of Nations. Or of the Compassions of *Ulysses* against the *Cicones*, who had formerly assisted *Priam*, of whom *Homer* in *Odyss.* 1. and there *Didymus*.

were not now Accessaries of another War, but attacked as Principals, on which account as a Denunciation of War was requisite by the Law of Nations, so a new Decree of the Roman People was necessary by the Law of Rome. The Consent of the People to make War against Antiochus was desired in this form, *Is it your Will and Pleasure, that War be made against Antiochus and his Adherents?* Which was also observed in the Decree against King Perseus. It ought to be understood thus, as long as that War should continue against those two Kings and their Adherents.

XI. The Reason a Solemn Proclamation is so absolutely required unto such a War, as by the Law of Nations is called Just, was not (as some imagine) to prevent Deceit and Treachery, for this rather relates to Magnanimity than Justice. As some Nations (y) (we read) have appointed both the time and place of Battle. But that it might manifestly appear, that the War is not made rashly, or for private Intents, but by the Consent of both Nations; or at least of their Sovereigns. For hence arise those Effects proper to a Just War, which in a War against Robbers, or a War made by a Prince against his own Subjects will not be allowed. Therefore Seneca distinguished it, *Wars denounced against Foreigners, or made against Subjects.*

XII. Now as some observe, and by Examples teach, that even in such Wars as these, whatever is taken becomes the Captor's, it is true but only on one side, and that too by the Law of Nature; but

XI. The reason why Denunciation is requisite to some Effects of War.

XII. That those effects are not to be found in other Wars.

(y) As some Nations (we read) have appointed both the time and place of Battle.] As the Romans did to Porfenna, as Plutarch relates in the Life of Publicola. The Turks two Days before a Battle made a great many Fires. Chalcocondylas 7. •

but not by the Voluntary Law of Nations, which only provides for the Safety of Nations, not of those who are either no Nation, or but Part of one. They are also mistaken that think a War, undertaken in defence of our Persons, or Goods, needs no Denunciation: For it is absolutely necessary, indeed not simply, but to obtain the Effects proper to a Just War, as we have already mentioned, and shall more fully explain.

XIII.
Whether a War may be made as soon as denounced.

XIII. Neither is that true, that War cannot justly be made as soon as it is proclaimed, which Cyrus did against the *Armenians*, and the *Romans* against the *Carthaginians*, as I said before. For by the Law of Nations a Denunciation requires no time to be allowed after it; but it may happen, that by a Natural Right some time may be required from the quality of the Business, as if Restitution be demanded, or Punishment required against an Offender, and not yet denied; for then convenient time is to be granted for the performing it.

XIV.
Whether against him that has violated the Right of Ambassadors, a War may be made tho' not denounced.

XIV. Nay, tho' the Rights of Ambassadors should be violated, it will not thence follow, that there is no need of Denunciation to obtain those Effects proper to a Just War; but it will be sufficient if it be done the safest way it can, by Manifestos, or by Citations or Proclamations, as is customary in Places that are not safe,

CHAP. IV.

The Right of killing Enemies in a Solemn War, allowed by the Law of Nations.

I. **S**ERVIVS upon this Verse of Virgil's,

Tum certare odiis, tum res rapuisse licebit.

*Then is your Time for Faction and Debate,
For Partial Favour and permitted Hate.*

Dryden.

deriving the Facial (or Herald) Laws from *An-
cus Martius*, and higher from the *Æquicoli*, says
thus, *When Men or Cattle were taken from the Ro-
mans by any other Nations, the Pater Pratus (King
at Arms) with some other Heralds, whose Office it
was to make Leagues, (and denounce War) went to
the Borders of that Nation, and standing there, with
a loud Voice proclaimed the Cause of the War; and if
they would not restore the things taken, or deliver up
the Offender (within thirty Days) (†) he threw a
Javelin (into their Territories) which was the begin-
ning of the War; and then it was lawful to plunder
and destroy. But he had before said, that the An-
cients by (Res rapere) meant all manner of Injuries,
tho' there was nothing at all of Rapine in the Case,
and by (Res reddere) all manner of Satisfaction.*
Whence we learn, that a War solemnly denounced
between two Nations, or their Sovereign, (a)
has some peculiar Effects, which War in its own
Nature

I. The
Effects of a
Solemn War
generally
explained.

(†) He threw a Javelin, or Spear.] cap. præced. N. 8.

(a) Has some peculiar Effects.] Crantzius Saxon. 11. 15.

Nature cannot pretend to: Which is very agreeable to what we have already quoted from the Roman Lawyers.

II. The word Lawful distinguish'd into what may be done without blame, tho' not to do is more commendable, and what is unpunishable.

II. 1. But we must observe, that this Word *Licebit* (will be lawful) in *Virgil* is capable of a double Meaning. For sometimes that is said to be *lawful* which is altogether Just and Honest, tho' perhaps some other thing may be more commendably done, as that of the Apostle St. Paul *πάντα μοι ἔσεν, ἀλλ' ἔ πάντα συμφέρει*, (Speaking of things indifferent in themselves,) *all things are lawful for me, but all things are not expedient*, 1 Cor. 6. 12. (b) as to Marry is lawful, but to abstain from Marriage with a Pious Intent is more laudable, as St. *Augustine* argues to *Pollentius* out of the same Apostle. To Marry also a second time is lawful; but to Marry but once is more

(b) As to Marry is lawful, but to abstain from Marriage with a pious intent is more laudable.] *Tertullian* against *Marcion* 1. Continnence would lose its witness, if Licence (to Marry) were taken away. See the same Author, B. 1. ad uxorem upon this Subject and concerning flight in times of Persecution; and St. *Jerom* to *Helvidius*, A Virgin deserves the greater Honour while she disdains that, which to do, were no Sin. And against *Jovinian*, therefore does Christ love Virgins the more, because they freely give what was not commanded them; and to *Pammachius*, Most excellent things are always left to the Judgment of the Hearers; there is no Necessity put upon you, that your freewill may be rewarded. And St. *Chrysostom* upon 1 Cor. 7. declares Continence to be the better; and upon Rom 7. 6. if we keep not the Commandments, we are threatened with Hell, thereby shewing that things positively commanded, are not like those that are left to the free Choice of the Combatant, (such are Virginity, and the renouncing of our Possessions) but the others must of necessity be performed; and in his Oration concerning Fasting he left Virginity without the Lists, he left it above what we are commanded to strive for, so that they who keep it shew the greatness of their Soul, and they who do not may enjoy the favour of God. Which he afterwards applies to ἀντηπαροὺν the renouncing of Possessions. To which we may add what *Gratian* gathers out of St. *Austin*, and others, *Caus. 14. quest. 1.*

more laudable, as (c) *Clemens Alexandrinus* rightly states the Question. A Christian Husband (d) may lawfully put away a Heathen Wife, as *St. Augustine* allows (which, with what Circumstances it may be proved, is not our Business here to dispute) but yet he may keep her. Therefore he adds, both are equally lawful by the Rules of Divine Justice, for God hath prohibited neither of them, but both are not equally expedient. *Ulpian* says of a Trader, (who had agreed (with the Buyer) if he did not fetch his Wine by such a Day, it should be lawful for him to pour it out:) Tho' he may do it, yet if he did it not, he is more to be commended.

2. (e) This word *Licere* (to be lawful) may be taken for that which is not Punishable by Human Laws, and yet is not consistent with Piety, or the Rules of Morality. Thus in many Countries Fornication is allowed. Among the *Lacedemonians*, and *Egyptians*, Theft was lawful. We read in

Quin-

(c) *Clemens Alexandrinus*.] *Stromat.* 4. where among other things, he speaks of one married a second time, He does not indeed Sin against any Covenant, for there is no Law that forbids it, but he does not fulfil that most excellent Perfection of an Evangelical Life.

(d) May lawfully put away a Heathen Wife, as *St. Austin* allows.] *B. 1. de adulter. Conjug. ad Fallent.* cap. 13. and 18. out of which places *Gratian* has transcribed many things, in *Caus. 28. quest. 1.*

(e) This word *Licere* (to be lawful) may be taken for that which is not punishable by Human Laws, and yet is not consistent with Piety, and the Rules of Morality.] *Fertullian* in his Exhortation to Chastity, License is for the most part the trial of Discipline; and again, all things are lawful, but all things are not expedient for me. *St. Chrysostom* of Repentance, 8. he that fed on Locusts and wild honey, declares with Authority, to him that is accustomed to stately and Royal Dainties, it is not lawful for you; but all things seem lawful to a King; and *Columella* in his Preface to *B. 7.* neither must we defend whatsoever is lawful, for the Ancients reputed Summum Jus the highest Law to be the highest Injury; and *St. Jerom* on *Jovinian*, the highest Law (or Right) is the highest Wickedness.

Quintilian: There are some things not commendable in their own Nature, yet tolerated by the Law, as by that of the 12 Tables, the Body of the Debtor might be divided amongst the Creditors. But this Acceptation of the word *Licere* (to be lawful) is not very proper, as *Cicero* observes in the 5th of his *Tusculans*: Speaking of *Cinna*, on the contrary I think him miserable, not only because he did such things, but because he so governed, that he might lawfully do them, tho' it is not lawful for any Man to Sin, but we are mis-led by the Error of Speech, when we say that is lawful which is only allowed. But yet this Notion of the Word is received (tho' not so proper) as when the same *Cicero* in behalf of *Rabirius Posthumus* thus addresses the Judges, Ye ought to consider what is suitable to be done, not what you may do by strictness of Law, for if you regard what is strictly lawful, you may put to Death whom you please. Thus it is said, it is lawful for Kings to do what they please, because they are ἀνευπύθουνοι, exempted from Punishment, as we have said elsewhere. But *Claudian* well advises a Prince or Emperor, when he says,

*Nec tibi quid liceat, sed quid fecisse decebit,
Occurrat*———

*Think not what is by strictest Law allow'd,
But what by Truth and Conscience is avow'd.*

And *Murionius* blames those Princes, μή τὸ καθήκει μοι λέγειν μεμληνότες, ἀλλὰ τὸ ἔχει μοι, who say thus I can do, rather than thus I should do.

3. And in this Sense we find *Licet*, (it is lawful) and *oportet* (it behooveth) opposed to each other, as often by (f) *Seneca*, the Father in his *Controversies*

(f) By *Seneca the Father*.] Among other things *Controv. B. 4. 24.*

verities. And in *Ammianus Marcellinus*, Some things are not fit to be done, tho' they may be lawfully done. And *Pliny* in his *Epistles*, We should avoid things that are dishonest, not because they are unlawful, but shameful. And *Cicero* in his *Oration* for *Balbus*, Some things are not fit to be done, tho' lawful. And for *Milo*, he says, *fas esse, it is lawful*, according to Nature, and *licite, it is lawful*, referring this to particular Laws. So *Quintilian* the Father, in one of his *Declamations* tells us, It is one thing to look to a Man's strict Right, and another to have respect to Justice.

III. Therefore in this Sense it is lawful for one Enemy to hurt another, both in Person and Goods, not only for him that makes War on a just account, and does it within those bounds which are prescribed by the Law of Nature, as we have said in the beginning of this Book, but on both sides, and without distinction; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion; neither can any other make War upon him barely upon this account. And in this Sense we are to take *Sallust*, *By the Right of War all things are lawful to the Conqueror*.

IV. This is the Reason why this was granted by all Nations, because when two Nations are engaged in War, it would be dangerous for any other Nation to judge of the Right of War, for by that means that Nation might quickly be involved in the War; as the Inhabitants of *Marseilles* argued in the Cause of *Cæsar* and *Pompey*; therefore they owned, that they had neither Wisdom, nor Power sufficient to determine, which had the juster Cause. Besides, even in a just War it is very hard by any outward Tokens to judge, which is the just Measure of defending our selves, of recovering our own, or of demanding Punishment,

III. The Effects of a Solemn War are generally Lawful and unpunishable.

IV. Why such Effects were introduced.

so that it is far better to leave it to the Conscience of the Persons engaged in War to determine these things among themselves, than to appeal to the Arbitration of others. The *Achaëns* in *Livy* thus addressed the Senate, *How should what had been acted by the Right of War, now come into Debate?* Besides this Effect of Licence, that is of Impunity, there is another also, of Dominion, of which we shall treat hereafter.

V. Testi-
monies of
these Effects.

V. 1. But that Licence which a just War gives to an Enemy to hurt another (which we now begin to treat of) extends first to his Person, of which we have many Testimonies in approved Authors. There is a great (g) Proverb in the Tragedy of *Euripides*,

Καθαῖος ἀπὸς τοῖς πολεμικοῖς ὁς ἂν κλάνῃ.

The Man who kills an Enemy is clear.

Therefore the Custom of the old Greeks was, not to Wash, Drink, much less to Sacrifice with him that was a Homicide (that is, had killed a Man out of War) but it was lawful to do it with him that in War had slain his Enemy; and frequently to kill is called the Right of War. And *Marcellus* declares in *Livy*, *Whatsoever I did among the Enemies, the Right of War defends.* So does *Alcorn* to the *Saguntines* in the same Author, *But I think this is rather to be endured, than that you should be all put to the Sword; to suffer your Wives and Children to be ravished, and dragged about before your Faces, by the Right of War.* And the same *Livy* in another place, relating the general Massacre of the *Astapenses*, adds, that it was done by the Right of War. And *Cicero* pleads thus for *Deiotarus*, *But how could he be suspected as your Enemy,*

(g) In the Tragedy of *Euripides*] *Ione*.

who cannot but remember, that when you might have adjudged him to die by the Law of Arms, you made both him and his Sons Kings. And for Marcellus, For when by the Right of that Victory we might have put them all to Death, we preserved them by your Royal Clemency. And Caesar tells the *Hadut*, That he had out of his Mercy preserved them, whom by the Right of War he might have slain. And Josephus in his Jewish War, καλον εν πολεμω θνησκειν, αλλα πολεμω νομω, τερ' εστιν υπο τ' ηρασεια, calls it honourable to die in War, but by the Right of War, that is by the Will of the Conqueror. And so Papinius,

*Non querimur casos, hac bellica jura, vicisque
Armorum*

We grieve not for our Men, who bravely dy'd,

(h) *This is the Chance of War, we're satisfy'd.*

2. Yet we must observe, that when these Authors write thus, it is not to be understood, that they wholly justify the Act as not sinful, but as not unishable, as appears from other places. Tacitus said, Peace considers the Causes and Merits, but in War the Guilty and Innocent fall alike. And in another place, Neither would the Laws of Humanity permit them to reward so unnatural a Murder, nor the Law of Arms to punish it. Neither is the Right of War to be otherwise taken, where Livy mentions, that the Greeks spared Aeneas, and Antenor, because they had been always for Peace. And Seneca in his Tragedy of Troas.

F 2 *Quod-*

(h) *This is the Chance of War.* Servius in the Extracts Ful. upon a *Eneid*, Pyrrhus by the Right of War killed Polices, but why before his father's Face? And Spartan in Severus, besides those whom the Right War had cut off.

Quodcumque libuit facere, victori licet.

The Victor's Will is an assured Law.

And in his Epistles, (i) *What we punish with Death in another, that we commend in a Soldier.* And St. Cyprian, It is a Fault when every one is guilty of Homicide, but when it is done upon a publick Account, it is called Valour; it is not the Nature of their Innocence, but the greatness of their Cruelty that renders them unpunishable. And a little farther, The Laws connive at Sin, and it is esteemed lawful, because it is publick. Thus Lactantius says, that the Romans did injure others by Law; and in the same Sense Lucan, *Jusque datum sceleri, Sin acted by Law.*

VI. All that are found among Enemies may be killed or outraged.

VI. But this Right of Licence is of a large Extent; for it reaches not only those who are actually in Arms, and the Subjects of the Prince engaged in War, but also all those who reside within his Territories; as may appear from that Form in Livy. *Let him, and all that live within his Country, be our Enemies.* And no wonder, since we may apprehend Damage from them, which in a War long and general is enough to justify the Right here spoken of, otherwise than in Reprisals, which, as I have said, were first introduced after the manner of Taxes laid for the Payment of publick Debts. Wherefore no marvel, if, as Balbus observes, this Licence in War be much greater, than that in Reprisals. And without doubt Strangers, that come into an Enemy's Country after a War is proclaimed, and begun, are liable to be treated as Enemies.

VII. But

(i) *What we punish with Death in another, that we commend in a Soldier.* Compare with what went before, B. 2. cap. 1. §. 1.

VII. But they who went thither before the War, are by the Law of Nations allowed (k) a reasonable time to depart, which if they do not make use of, they are accounted Enemies. For thus the *Corcyreans*, before they laid Siege to *Epidamnus*, gave notice to all Strangers to depart, or else they should be reputed Enemies.

VII. What if they came thither before the War.

VIII. 1. But such as are Natural Subjects of the Enemy, if we respect only their Persons, may in all Places be assaulted; because (as we have shew'd already) when War is proclaimed, it is done against a Prince, and his People, in the form of Denunciation. So in the Decree against King Philip, They did will and command, that War should be denounced against him, and the Macedonians under his Dominion. And he that is an Enemy may by the Law of Nations, be assaulted every where, according to *Euripides*,

VIII. The Subjects of Enemies every where, unless protected by another Prince.

Νόμος. ὅς ἐχθρὸν ὁρᾷν ὅπου λάβης καὶ αὐτὸς.

Assault your Enemy where'er you find him.

And in *Marcian* the Lawyer, *Renegadoes, where-ever they are found, may be killed as Enemies.*

2. They may then lawfully be killed in their own Country, in the Enemies Country, in a Desert that belongs to no Body, or on the Sea. But that we may not kill or plunder them in a peaceable Country, proceeds not from their own Persons, (l) but from the Right of that Prince in whose Dominions they are. For all Civil Societies may ordain, that no Violence be offered to any in their Territories, unless it be first tried in

F 3

(k) A reasonable time.] *Bembo* 7. *Hist.* *Cicero* makes use of that Defence for *Ligurius*. You have an Example in *Lucy*. B. 25. de *Civ. Camp.* others in *Thucydides*, B. 1. and 5.

(l) But from the Right of that Prince in whose Dominions they are.] Compare the things to be said hereafter. cap. 6. §. 26. and *Alberic*, *Genl. Hispan. advocat*, B. 1. c. 6. *Weckner* in *Concil. Franc.* 92.

a Judicial way, as we have proved out of *Euripides*,

*If you can charge these Guests with an Offence,
Do it by Law; forbear all Violence.*

But where Courts of Justice are free, there the Merit of the Person is consider'd, and then this promiscuous Licence of hurting each other ceases, which I have said was granted among Enemies in time of War. (m) *Livy* relates that seven *Carthaginian* Gallies rode in a Port belonging to *Syphax*, who at that time was in Peace both with the *Carthaginians* and *Romans*, and that *Scipio* came that way with two Gallies; these might have been seized by the *Carthaginians* before they had entered the Port, but being forced by a strong Wind into the Harbour, before the *Carthaginians* could weigh Anchor, they durst not assault them in the King's Haven.

IX. This
Right of
hurting ex-
tends to
Women and
Children.

IX. 1. But to return to the point in hand, how far this Licence extends it self, will hence appear, in that the Slaughter of Infants and Women is allowed, and included by the Rights of War. I will not to this refer the slaying of the Women and Children of *Heshbon* by the *Hebrews*, *Deut. xi. 34.* nor that they were commanded to do the like to the *Canaanites*, *Deut. xx. 16.* (n) and their Associates. It was the special Act

(m) *Livy*] See the like Fact of the *Venetians* hindring the *Greeks* from assaulting the *Turks* in a *Venetian Port* in *Chalcocondylas*, B. 9. of the *Venetians* and *Turks* at *Tunis* in *Bemb.* B. 4. of the *Pisans* and *Genoese* in *Sicily* *Bizar* in *bel. Pis.* and *Paulinus*, *Got.* of *Rostochius*, and *Gripwaldia*.

(n) *And their Associates*] As the *Amalakites*, of whom *Josephus*, B. 6. 8. in the Affairs of *Saul*. He went to the Slaughter even of Women and Children, believing himself to do nothing therein cruel, or contrary to human Nature, chiefly because they were Enemies against whom he did it, &c.

of God, whose Right over Men is far greater, than that of Men over Beasts, as we have proved elsewhere. That which comes nearest to testify the common Custom of Nations, is that of the Psalmist, *Psal. cxxxvii. 9. Blessed shall he be, that taketh thy Children, and throweth them against the Stones.* Like to that of *Homer (o)*

Καὶ ὑπὲρ τέκνα
βαλλόμενα περὶ αἶψα ἐν αἰνῇ θνητότητι.

*When bloody Wars a wretched Land infest,
The harmless Infants suffer with the rest.*

2. The *Thracians* of old having taken the City *Mycaleffus*, put Women and Children to the Sword, as *Thucydides* informs us. *Arian* relates the same of the *Macedonians*, when they took *Thebes*; and so did (p) the *Romans* at *Ilurgis* a City of *Spain*; *ἐκτεναν βμαλῶς καὶ παῖδια καὶ γυναῖκας*, They slew Women and Children without distinction, which are the words of *Appian*. *Germanicus Caesar* is reported by *Tacitus*, to have wasted the Villages of the *Marsi*, (a People of *Germany*) with Fire and Sword; adding, *Neither Sex nor Age found any Pity.* And

F 4

(o) *That of Homer.]* Out of the same *Homer*, *Severus* uses these words against the *Britains*,

Μὴδ' ἐνίνα, &c.

*None who in Wombs of tender Mothers are,
Shall now escape the Miseries of War.*

(p) *The Romans at the taking of Ilurgis.]* *Scipio* at the taking of *Numantia*: The Soldiers of *Julian* on the Women left by the *Dauri*, *Zozimus* 3. And the same *Julian* having taken *Majozamalthu* without distinction of Sex or Age, put all to the Sword, where he found any Resistance, says *Ammianus*, B. 14.

the Emperor Titus exposed the Women and Children of the Jews to be devoured by Wild Beasts in the publick Shews; and yet these two Princes were never esteemed to be of a cruel Nature: Cruelty was so grown into a Custom. No wonder then if old Men were also killed, as Priam by Pyrrhus.

X. Yea and to Captives, and that at any Time.

X. 1. (q) Neither were Prisoners exempted from this Licence; Pyrrhus in Seneca, according to the Custom at that time, pleads thus:

Lex nulla capta parcat, aut penam impedit.

No Law indemnifies the Captive Slave.

Neither does it extend to Men only, but also to Captive Women; for thus argues Scylla:

At belli saltem captivam lege necasses.

By Law of Arms your Captive you might kill.

To the same purpose is that of Seneca to be understood of a Woman, namely Polyxena, who being a Prisoner might have been slain. Yet the Advice of Horace is better:

Vendere

(q) Neither were Prisoners exempted from this Licence. Elisha in Josephus, esteemed it lawful to kill Prisoners taken by the Right of War. Virgil therefore brings in his Prisoner, beseeching

Per patrias manes, &c.

By Young Julius, by thy Father's Shade,

O spare my Life, and send me back to see

My Languing Sire, and Tender Progeny.

Dryden.

Winikind, B. 2. speaks of 70000 Selawi taken by Otha, put to Death.

Vendere cum possis captivum, occidere noli.

Forbear to kill the Captive, Thou canst sell.

Creech.

For he grants it to be lawful, that he might kill him. And *Donatus* calls them Servants, because they are saved alive, whereas they might have been killed by the Law of Arms; so the Prisoners taken at *Epidamnus* were killed by the *Coreyreans*, as *Thucydides* relates, and 1000 Prisoners by *Hannibal*. And in *Hirtius*, a *Cæsarean* Captain in the *African War* thus addresses *Scipio*, I return you thanks, that you have been pleased to engage your word for my Life and Safety, being Prisoner by the Right of War.

2. Nor is this Licence of killing our Captives confined to any time, by the Right of Nations, but by Municipal Laws it is restrain'd more or less in some Places.

XI. We meet also with many Examples of Suppliants that have been slain, as of *Achilles* in *Homer*, of *Mago*, and *Turnus* in *Virgil*; which are therefore recorded, to justify the like Practice by the Right of War. For *St. Augustine* commending the *Goths*, for sparing Suppliants, and those that had fled for Refuge to Churches, acknowledges, that which by the Right of War they might do, they thought unlawful for them to do. Neither are they always received to Mercy, that beg it; witness the *Greeks* who served the *Persians* at the *Granicus*. And the *Uspenses* in *Tacitus* begging leaving to depart only with their Bodies, which (he says) the Conquerors denied, but let them die by the Law of Arms. Observe here also the Right of War.

XI. Yea, even to such as are willing to yield, if not accepted of.

XII. (r) Nei-

XII. Yea,
and so such
as yield
without
Conditions.

XII. (r) Neither do they always find Mercy, that surrender without any Condition, but are often slain, as the Princes of *Pomeria* by the *Romans*, the *Samnites* by *Sylla*, the *Numidians*, and *Vercingetori* by *Cæsar*. Nay, it was almost the constant Custom of the *Romans* (s) on the Days of their Triumph to put to Death the Commanders of the Enemies, as *Cicero* tells us in his fifth Oration against *Verres*. *Livy* elsewhere, and also in his 28th Book. *Tacitus* in his 12th Annal, and many others. And the same *Tacitus* informs us, that *Galba* caused the tenth Man to be killed of those, whom upon Submission he had received to Mercy; and *Cæcina* upon the Surrender of *Aventicum*, caused *Julius Alpinus* to be slain, as the chief Promoter of the War, he left the rest to either the Mercy, or Cruelty of *Vitellius*.

XIII. This
Right not to
be referred
to any other
Cause, as
Retaliation
Obstinacy of
Defence,
&c.

XIII. (r) Historians sometimes set down the Reason of this Cruelty, of the Enemies, especially to Captives, and Supplicants, as either by way of Retaliation, or because of an obstinate Defence. But these are rather Pretences, than just Causes, as I have distinguished in another Place. For just Retaliation (properly so called) is to be executed only upon the Person of the Offender (as has been already said, when we treated of the Communication of Punishment.) But on the contrary, in War

(r) Neither do they always find Mercy, that surrender without any Condition, but are often slain.] See *Ihuanus B.* in the year 1580. in the Affairs of *Ireland*.

(s) That on the Days of their Triumph they should be put to Death.] The like was done at *Regino*. in the year 905.

(r) Historians sometimes set down the Reason of this Cruelty of the Enemy especially to Captives, and Supplicants, as either by way of Retaliation, or because of an obstinate Defence.] As *Chalcondylas*, B. 8.

War this Right of Retaliation is often exercised upon the Innocent. This Custom is thus described by *Diodorus Siculus*, *The Chance of War being equal on both sides, neither Party can be ignorant, that if they be vanquished, they must suffer the same themselves, which they intend to their Enemies.* And in the same Author, *Philomelus the Phocian General, Diverted the Enemies from an insolent and cruel Revenge, by threatening to do the (u) like in Case of Victory.*

2. But there is no Man will judge an obstinate Defence to be Criminal, as the *Neapolitans* alledged to *Belisarius* in *Procopius*, that according to the ancient Roman Discipline, to do otherwise, was always accounted a Capital Crime, especially if we were engaged therein either by a Natural Obligation, or by an honest and deliberate Choice; for in these Cases they rarely allowed any Excuse, were the fear or danger never so great. *Livy* says, *to desert a Garrison, was Capital amongst the Romans.* Every one therefore may use this Rigour to his own Advantage, and this Rigour is defended before Men, by that Right of Nations, which we now treat of.

XIV. This Right also reaches to Hostages, nor to them only, who freely give themselves as Pledges for Performance of Articles of Agreement, but also those who are delivered up by others. 250 Hostages were slain by the *Thessalians*, and 300 *Volscians* by the *Romans* at *Aurunca*. But we must observe, that sometimes Children were given as Hostages, as we may learn from the *Parthians*, and from

XIV. It extends also to Hostages.

(u) By threatening to do the like.] See the same *Diodorus Spondius* and *Amilcar Barcas* in *Extract, Peires.*

XV. By the
Law of Na-
tions it is
forbidden to
kill any by
Poison.

from *Simon Macabaeus*, and sometimes Women, as by the *Romans* in the time of *Porfena*, and by the *Germans* in *Tacitus*.

XV. 1. As the Law of Nations tolerates many Things, in this Sense which we now speak of, which are forbid by the Law of Nature, so it prohibits some things allowed by this Law of Nature. For if we respect the Law of Nature, if a Man has deserved Death, it signifies not much, whether we do it by the Sword or Poison. I say the Law of Nature, tho' it is far more generous to attempt another Man's Life in such a manner, as to give him an Opportunity of Defending himself, yet this is not allowed to those who deserve to die. But the Law of Nations, if not of all, yet of the better part of them, allows not the taking the Life of any one, no not of an Enemy, by Poison; which Custom was introduced for a general Benefit, lest Dangers, which are very common in War, should be multiplied beyond Measure. And it is probable, that it was first made by Kings, whose Life being chiefly defended by Arms, is more in danger of Poison, than that of other Men, unless it were secured by the Severity of Law, (*) and fear of Disgrace and Infamy.

2. *Livy* speaking of *Perseus*, calls it a *Clandestine Villany*. *Claudian* of the Offer of *Pyrrhus's* Physician to Poison him rejected by *Fabritius*, calls it *Impiety*; so does *Cicero* hinting at the same Story. The Consuls replied, it concerned the Publick, that such a thing should not be allowed, in their Letter to *Pyrrhus*, which *Gellius* recites out of *Cl. Quadrigarius*; and *Val. Maximus* observes, Wars should be waged

(*) And by fear of Disgrace and Infamy. The Senators said to *Pyrrhus*, lest any hurt done to you should reflect upon us.

suaged by Arms, not by Poison. And Tacitus relates, that when the Prince of the Catti offered to Poison Arminius, Tiberius refused it, therein equalling in Glory the ancient Generals. Wherefore (y) they that hold it lawful to Poison an Enemy (as Baldr did by the Authority of Vegetius) do regard the mere Law of Nature, but over-look that Law which is established by the Consent of Nations.

XVI. Somewhat different from this manner of poisoning (as having something of Force in it) is to Poison the Heads of Darts, and thereby force Death a double way, which Ovid says (z) was much practised by the Getes, Lucan by the Parthians, and Silius by some of the Africans, and Claudian particularly by the Ethiopians. But this is (a) contrary to the Law of Nations tho' not of all, yet of the European, and all others civilized like them which is rightly observed by Salisberienfis, whose words are these: Neither do I find the use of Poison allowed by any Law, tho' sometimes practised among Infidels. Therefore Silius calls it, to disgrace the Sword by Poison.

XVI. Or to
empoison
Waters or
Weapons.

XVII. And
not only
this way
but many
other ways
are used
to poison
the Waters.

XVIII.
Whether it
be lawful
to poison
the Waters
of an Enemy
is a question
of great
importance
and has
been much
disputed
by the
School Divines.

2. So

(y) They that hold it lawful to Poison an Enemy.] See Bembus of the Venetians at the end of the 3d B.

(z) Ovid says was much practised by the Getes.] Of the Scythians, Pliny, B. 11. 53. The Scythians dip their Arrows in Vipers Gore and Human Blood. It is an incurable mischief to bring Death immediately with a slight Touch. Of the Servians, see the Supplement of Helmoldus, c. 4.

(a) But this is contrary to the Law of Nations.] Therefore the Mermerides, Odyss. 1. denies Poison to Ulysses for his Darts.

Ἐπεὶ δὲ θεὸς ἑμεσὶ ζῆτο ἀνὴρ ἑρπας.

He justly dreaded the immortal Gods.

22. So also the empoisoning of Springs (which cannot long be concealed) *Florus* declares to be unlawful, as being repugnant to the Constitution of Men, and the Laws of the Gods; where we may observe (as I have said before) that prophane Authors generally ascribe the Laws of Nations unto the Gods; neither should it seem strange, that there is such a tacit Agreement among Nations, in order to lessen the Dangers that attend the Wars, when of old it was agreed between the *Chalcidians* and *Eretrians* during the War, *ἡ δὲ πόλις δαὶ τῆλε βόλοις*, It should not be lawful to throw Darts.

XVII. But not any other ways to corrupt the Waters.

XVII. But it is not the same, when Waters are (b) (without Poison) so corrupted, that they cannot be drunk, which *Solon*, and the *Amphictyones* proved against the Barbarians. *Oppianus* of Fishing, declares it was commonly done in his time. It being no otherwise, than if the Current of a River were turned, or (c) the Veins of a Spring cut off, which by the Law of Nature, and the general Consent of Nations are allowed.

XVIII. Whether it be against the Law of Nations to employ private Murderers, explained.

XVIII. 1. But it is frequently disputed, whether the Law of Nations permits the sending one privately to kill an Enemy. But to explain this, we must distinguish between the Persons sent. For if they violate their Faith given expressly or tacitly, Subjects to their Prince, Vassals to their Lord, Soldiers to their General, protected Suppliants, Strangers, or Renegados to them that have entertained them, or if the Person sent owe no Faith

(b) Without Poison] By dead Bodies, or *Asbestus* (an unquenchable Stone) which *Belisarius* used in the Siege of *Auxinum* (*O Simo*) *Prosop. Goth.* 2. or Lime, as the *Turks* did at *Dibibrat*. *Nicetas B.* 1. of *Alexius* the Brother of *Isaacus*. There are also such in *Otho Frisingens.* and *Gunther Ligur.*

(c) The Veins of a Spring cut off] See *Priscus* in *Extract Legat.*

to him, against whom he is employed. Thus *Pepin* Father of *Charles the Great*, attended with only one of his Guard, pass'd the *Rhine*, and killed his Enemy in his own Chamber. Which *Polybius* relates was attempted by *Theodotus* an *Ætolian* against *Ptolemy* King of *Ægypt*, in the same manner, calling it, *ἐκ ἀνδροσύου τοῦ μὴν*, *no unmanly attempt*. Such was that famed Enterprize (e) of *Q. Mutius Scaevola*, which he himself thus defends, *I being an Enemy would have killed an Enemy*. *Porcena* himself acknowledged this to be an Act of great Valour. *Valerius Maximus* calls it a pious and gallant Resolution; and *Cicero* commends it in his Oration for *P. Sextius*.

2. For to kill an Enemy any where is allowed both by the Law of Nature, and of Nations (as I have said already) neither is it of any concern, how many thus act or suffer. 600 *Lacedemonians* with King *Leonidas* marched through the Enemy's Camp to the King's (*Xerxes*) Pavilion; the same (f) might have been done by fewer. There were but a few, that circumvented *Marcellus* the Consul, and slew him, and had almost killed *Petilius Cerealis* in his Bed. (g) *St. Ambrose* commends *Eleazar*, that assaulted a mighty Elephant higher than all the rest, supposing the King had sat upon it. Neither

(d) *Pepin*.] See *Paulus Wernafred*, B. 6.

(e) Of *Q. Mucius Scaevola*.] called by *Plutarch*, a Man excellent in all Virtues.

(f) The same might have been done by fewer.] *Valens* promised a Reward to any one that brought him the Head of a *Scythian*, so they made Peace. *Zosimus* 4.

(g) *St. Ambrose* commends *Eleazar*.] And *Josephus Antiq. Histor.* 15. There is a like Action of *Theodosius* against *Eugenius* in *Zosimus* B. 4. of the French against the King of *Persia* in *Agathias*, of ten *Persians* against *Julian*, in *Ammianus* 24. and *Zosimus* 3. of *Alexius Comnenus* against *Toruses*, in *Nicetus Choniates*, B. 4. de *Manuele*. Of the *Bulgarians* against the Emperor *Nicephorus* in *Zonaras*.

ther are they only, that make these Attempts, but also they that employ them excusable by the Law of Nations. Those ancient *Roman* Senators so renowned for their Wars, were esteemed the Authors of that gallant Attempt of *Scævola*.

3. It is to no purpose to object, that such Men being taken have been put to exquisite Torments, for that is not, because they violate the Law of Nations, but because by the same Law of Nations, any thing done against an Enemy is lawful, and every one is more or less severe to their Advantage. For so are Spies used, yet it is held lawful by the general Consent of Nations to send such, as *Moses* and *Joshua* did. (*ἡ δὲ τῶν κατασκοπέων ἔρεσις*, It is the Custom to kill Spies) said *Appian*, and that justly sometimes by such as have manifestly a just Cause to make War, by others only by the Licence which the Law of Arms gives. But if there be any, (*b*) that will not make use of such service, when offered, that is rather to be attributed to Magnanimity, and the Confidence of his own Strength, than to an Opinion, of its being just or unjust.

4. But the Case is otherwise of those Assassins, who act treacherously, for they not only transgress the Law of Nations, but also those that employ them. For though in other things, they that make use of wicked Instruments, though against an Enemy, may be reputed guilty before God, yet not before Men, that is, he has not offended against the Law of Nations; because, in this Case,

Mores leges perduxerunt in potestatem suam.

Custom has prevailed above Laws.

And

(*b*) That will not make use of such Service when offered.] See *Cromerus*, p. 3.

And to deceive (*Pliny* says) according to the Custom of the Age, is Wisdom; yet this Custom does not reach to the killing an Enemy, for he that should thus make use of another Man's Treachery, is held not only to offend against the Law of Nature, but also of Nations. This is plain from what *Alexander* wrote to *Darius*, *Ye wage impious Wars, and though you carry Arms, you set a Price upon your Enemies Lives.* And again, *You do not observe towards me the Law of Arms.* And in another Place, *I ought to persecute him to Death, not as a just Enemy, but as a treacherous Murderer.* And to this we may refer that of *Livy* concerning *Perseus*, *He does not wage a just War like a Prince, but uses all base and clandestine Villanies, like Thieves and Prisoners.* And in *Marcus Philippus* of the same *Perseus*, *All which how hateful they were to the Gods; he would find by Experience.* And also *Valerius Maximus*, the Murder of *Viriatius*, (i) had a double Perfidiousness, the one of his Friends, who killed him, the other in *Q. Servilius Cæpio* the Consul, who was the Author of it, by promising Impunity, and he deserved not the Victory but bought it.

§. Now the Reason why this is not allowed, as in other Cases, is what we gave before in the Case of Poison, to lessen the Dangers attending Princes. *Eumenes* in *Justin* said, he could not believe, that any Commander would so desire to Conquer, (viz. by hiring to kill his Enemy) as to set so bad an Example against himself; and in the same Author, when *Bessus* had assassinated *Darius*, it is said, it

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(i) The Murder of *Viriatius*.] The Writer of the Lives of famous Men. Which Victory because it was bought, was disapproved by the Senate; and *Eutropius*. When his Murderers demanded their Reward *Cæpio* the Consul they were answered, it never pleased the Romans, have a General killed by his own Men (where perhaps it should have been promised by *Cæpio* the Consul.) So *Ammianus* condemns the Murder of *Sertorius*, B. 30.

was not be endured for Example's sake, 'and that it was the Common Cause of all Kings. And OEdipus, to justify the killing of King Laius, says in Sophocles,

Καὶνὸν περὶ σφαρῶν ἐν ἑμαυτῶν ὄφελός.

Assisting him, I also help my self.

And in Seneca on the same Subject.

Regi tuenda est maximè Regum salus.

Kings should in Honour save their Fellow-Kings.

And the Roman Consuls in their Letter to Pyrrhus, For common Example's and our Honour's sake, we endeavour your Safety.

6. In a Solemn War then, and among those who have a Right to denounce a Solemn War, it is not allowed: But where there is no Solemn War, it is accounted Lawful, by the same Law of Nations. So Tacitus (k) declares the Plot against the Life of Gennasius, was not ungenerous, because he was a Traitor. Curtius said the Treachery of Spitamenes to Bessus was the less odious, because no Perfidiousness seem'd unjust against a Murderer of his Prince. Thus Treachery towards Robbers and Pirates, though it be not altogether blameless yet is not punished by the Law of Nations, in Detestation of the Villain.

XIX. Th

(k) Declares the Plot against the Life of Gennasius.] So of Flavianus and Barchabas, who brought in the Revolter Procopius: Ammianus, if they had betrayed a lawful Prince, Justice is self might with Reason have condemned them to die. If a Rebel and a Disturber of the National Peace, their brave Act deserves large Rewards. So Artabanus is commended for killing Gontharidas, by the Historian Procopius, the end of his ad Vandal. add Cromer. B. 28. of the Murder of Schodolius.

XIX. 1. The Ravishing of Women is sometimes permitted in War, and sometimes not. They that permit it, respect only the Injury done to the Body of an Enemy, which by the Law of Arms they think should be subject to the Will of the Conqueror. But others much better, look not to that Injury alone, but to the Act of unbridled Lust, which no way contributes to the Security of the one or Punishment of the other, and therefore should be as much punished in War as in Peace; and this last is the Law of Nations, not ill, but of the better sort. So *Marcellus*, before he took *Syracuse*, is recorded to have taken (1) particular Care to preserve the Chastity even of his Enemies. *Scipio* (in *Livy*) said it concerned his own Honour, and that of the People of *Rome*, that nothing reputed Sacred by the more civilized Nations should be profaned by them (his Soldiers). *Diodorus Siculus* complains of *Agathocles* his Soldiers, *ἵνα καὶ τὰς γυναῖκας ὑβρίσωσι καὶ παρανομίας ἀνίσχοντο*, they did not abstain (n) from that contumelious and impious Sin of violating the Chastity of Women. *Ælian* speaking of the victorious *Sicyonians* ravishing the Wives and Virgins of the *Pelleneans*, exclaims, *ἡμεῖς ταῦτα ὡς θεοὶ Ἕλληνας, καὶ ἐνὶ οὐ βαρβάρους καλὰ καὶ αἰσχύνην ἱμῶν μνησθῶμεν*. These, (O ye Gods of Greece!) are Acts so cruel, and abominable, as were never practised among the Barbarians, in the Memory of Man.

XIX. Whether Ravishing of Women be against the Law of Nations.

G 2

2. And

(1) Taken particular Care to preserve the Chastity.] And *Lucullus* according to *Xiphilinus*; see the Edict of *M. Cato* in *Procop. Vandal. I.*

(n) Contumelious and impious Sin.] And *Appian* in the *Mithridatic War*, of the Prisoners at *Chios*, the Women and Boys were barbarously forced by those that took them.

2. And certainly it is very reasonable, that this should be (n) observed among Christians, not only as a part of Military Discipline, but as a part of the Law of Nations, viz. that whosoever should force a Woman, though in time of War, should be in every Place punishable. For by the Hebrew Law none did it without Punishment, as we (o) may gather from that part, which treats of a Captive Virgin, Deut. xxi. 10. That the Captor might marry her, but upon dislike might not sell her. Thou shalt not take Money for her, because thou hast humbled her. Upon which Becca, one of the Hebrew Doctors thus Comments, God would have the Camp of Israel to be holy, not defiled with Whoredoms, and other Abominations, like the Camp of the Gentiles. Arrian speaking of Alexander's falling in love with Roxane, says, ἐκ ἐθελῆσαι ὑβρίσαι καθάπερ αἰχμαλώτην, ἀλλὰ γῆμαι γ' οὐκ ἀπαξιώσαι; He would not ravish her as a Captive, but honourably married her; which he highly commends. And Plutarch of the same οὐκ ὑβρίσεν, ἀλλ' ἐγήμε φιλοσόφως, he scorned to abuse her, but married her as a Philosopher. Plutarch also mentions one Torquatus banished by the (p) Romans into the Island Corfica, for ravishing his Prisoner

(n) Among Christians.] Belisarius always observed it, and so did Totilas at the taking of Cuma and Rome. Procop. Goth. 3.

(o) From that part, which treats of the Captive Virgin.] Which Phlegon elegantly explains in his Book, περὶ οἰκλανθραπίαις, and Josephus against Appion. The Law also takes care of Prisoners of Wars, to preserve them from reproach especially Women.

(p) Into the Island Corfica.] But Cosroës King of Persia crucified one for ravishing the Virgin Apamea, Procop. Persic. 2.

CHAP. V.

Of Spoil and Rapine in War.

Cicero in the third of his *Offices* declares, (a) *It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill. No wonder then if the Law of Nations allows to spoil and waste an Enemy's Lands and Goods, since it permits him to be killed. Polybius tells us in the 5th of his History, by the Right of War it is lawful to take away, or destroy the Ports, Havens, Cities, Men, Ships, Corn, Cattle, and such like things of an Enemy. And we read in Livy, there are certain Rights of War, which as we may do, so we must suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Beasts. We may find in History, almost in every Page, the dismal Calamities of War, whole Cities destroyed, their Walls thrown down to the Ground, the wasting of Countries with Fire and Sword. And we may observe, these things are lawful to be done, even to those that surrender themselves. The Townsmen, says Tacitus, freely set open their Gates, and yielded themselves and all they had to the Romans, whereby they saved themselves, but Artaxa- was burnt by the Romans.*

I. The Goods of an Enemy may be spoiled, or taken away.

II. 1. Neither does the meer Law of Nations except Sacred things, that are Consecrated to one or more Gods, setting aside the Consideration of other Duties (of which we will treat hereafter)

II. Even those that are Sacred, which how to be understood.

G 3

from

(a) *It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill.* Suetonius in Nero LI. as if it were by a natural opportunity to plunder rich Provinces by the Right of War, and Cyprian of Mortality. So when any City is taken by an Enemy, they are all plundered and made Prisoners.

from these Insults of War. Pomponius the Civilian tells us, *when Places are taken from the Enemies, (b) all things therein cease to be Sacred.* Cicero in his fourth Oration against Verres observes, *The Victory made all the Sacred things of Syracuse Profane.* The Cause of which is this, because those things which are called Sacred, are not to be exempted from Human Uses; (c) but are made Publick, for they are called Sacred, from the End only to which they were intended. For instance, when one People submit themselves to another Nation, or King, they then deliver up what is called Sacred, as appears from the form which we have elsewhere quoted out of Livy; to which agrees that in Plautus's *Amphitruo*,

*They deliver up their City, Fields,
Altars, Houses, and themselves,*

And again,

*They deliver up themselves, and all they have,
Divine and Humane.*

2. Ulpian infers therefore, that there is a Publick Right even in things that are Sacred. Pansanius tells

(b) *All things therein cease to be Sacred.* Tertullian in his *Apolog.* says, *That War and Victory chiefly consist in the taking and destroying Cities: that is not done without Injury to their Gods.* The Destruction reaches to Sepulchres and Temples: and the Priests suffer alike with the Citizens; and there is the same plundering of Divine Treasures as of Profane. As many Trophies then as the Romans had, so many Sacrileges were they guilty of. As many Triumphs over their Gods, as over Nations. As many Spoils as there still continue Images of the Gods. And again, And well, if any Misfortune befall the City the Destruction of Temples was the same with that of the Walls.

(c) *But are made Publick.* Marsilius Patavinus in *Defens. Pacis*, cap. 8. p. 2. Nicolas Boerius decis. 69. Num. 1. Bossius in *crim.* de *soix competente*, Num. 101. Coshmannus *Conf.* 100. Num. 39.

tells us in his *Arcadice*, that it was a common Custom with the *Greeks* and *Barbarians*, that things *Sacred* should be at the disposal of the Conqueror. So when *Troy* was taken, the Image of *Jupiter Herculeus* fell to the share of *Sthenelus*: And *Thucydides* brings many Examples of the like Custom, *Lib. 4.* τὸν δὲ τοῖς ἑκαστοῖς, &c. It was a Law among the *Grecians*, that he who was Master of any City, or Country, whether great, or small, (cc) was also of the Temples. To which also that in *Tacitus* agrees, all the Ceremonies, Temples and Images in the *Italic Towns*, were at the Disposal, and under the Power of the *Romans*.

3. Wherefore the People themselves changing their Minds, may turn any thing Sacred into Profane, which the *Civilians*, *Paulus* and *Venulejus*, plainly prove. And in times of Necessity Sacred things (d) have been converted, even by those who consecrated them, to the Uses of War, as by *Pericles*, but with a Promise of full Restitution, by *Mago* in Spain,

G 4

(cc) Was also of the Temples.] And *Polybius* takes notice of this Custom, as hereafter, cap. 8. § 4.

(d) Converted even by those who consecrated them to the Uses of War.] As by the *Syracusians* in the Days of *Timoleon*, in whole Life *Plutarch* mentions it. The *Chians* also raised the Tax laid upon them by *Mithridates*, by selling the Consecrated Vessels, as *Appian* in his *Mithridatic*. *Pliny* B. 7. Cap. the last speaking of *Porcius Cato* says, he suffered the Consecrated Trees and Groves to be cut down, having first offered Sacrifices: The reason of which *Aet* he also gives in the same Volumes. *Sylla* in his War against *Mithridates* took away from *Delphos* what had been presented by *Olympia* and *Epidaurus*. According to *Plutarch* and *Appian* he restored the full value thereof. *Diodorus Siculus* in Extract. *Peires*. *Augustus* borrowed Treasures of the Temples, as *Appian* informs us, *Civil. 5.* *Agapetus* pawned all the consecrated Vessels, says *Cassiodore* 12. 20. *Heracles* in great Necessity converted the Church Vessels into Money, but afterwards restored the value of them, as *Theophanes* records. See also *Anna Comnena*, B. 5. and 6. *Cromer* B. 23. The Oration of *Laurentianus Bembo* B. 6. add also what will be said in the 21st Chap. § 23.

Spain, the Romans in the Mithridatic War, by Sulla, Pompey, Cæsar, and others. Tiberius Gracchus says in Plutarch, ἵερὸν καὶ ἄσυλον εἶναι ὅπως ἴσιν, &c. There is nothing so sacred, so inviolable, as things consecrated to the Gods, and yet no body hinders the People from using or removing them at their Pleasure. Our Temples, says (d d) Seneca in the Controversies, are stript for the State, and we take our Offerings to pay our Soldiers. And Trebatius the Lawyer in Cæsar's time, That is Profane, (e) which from a Sacred, or Religious Use, is converted to that of private Men. Thus Germanicus used this Right of Nations against the Marß, as Tacitus relates, He destroyed all things both Sacred and Profane, and levelled with the Ground that most famous Temple among those Nations which they called Tanfanæ: To this we may add that of Virgil,

If my Religious Hand
Your Plant has honoured, which your Foes profan'd.
Dryden.

Pausanias observes, that things consecrated to the Gods (f) used to be taken by the Conquerors; and
Cicero

(d d) Seneca in the Controversies.] In the Extracts 4. 4.

(e) That is Profane, which from a Sacred or Religious Use, is converted to that of private Men.] Servius upon the 2d Æneid of the Temple of Ceres. Æneas knows it was profaned before. He has the same on the 3d and 9th and 12th Æneid. But upon the 7th Eclogue, Things offered to the Gods are so long holy, and may be called Offerings, as they continue not profaned.

(f) Used to be taken by the Conquerors.] Virgil Æneid. 5.

Neptuni sacra, &c.

Long since from Neptune's Bars in Triumph brought. Dryden.

Plutarch in Fabius says, that the Image of Hercules, which he took at Tarentum, was sent to the Capitol, the rest of the Gods, as being
Angry

Cicero calls it the Law of Arms, speaking of *P. Servilius*, He took away, says he, the Images, and the Ornaments of the Enemy's City, taken by Force and Valour, by the Law of Arms, and Right of Conquest. So *Livy* concerning the Ornaments taken out of the Temples at *Syracuse* by *Marcellus*, and brought to *Rome*, said they were got by the Right of War. And *C. Flaminius* in his Oration for *M. Fulvius*, The Images were carried away, and other Acts commonly done at the taking of Cities. Also (g) *Fulvius* calls this very thing the Right of War. And *Cæsar* in *Sallust* relating the Miseries that usually fall on the Conquer'd, mentions the robbing of the Temples (h).

4. But this is true, if it be believed, that there is any thing of a Deity in this or that Image, then to break or spoil it, is to them that are of that Opinion, a great Impiety. And upon this Supposition they that commit such Robberies are so often accused of Wickedness, and of violating the Law of Nations; but if the Enemy be of another Opinion, then it is not so. As it was not only permitted, but commanded the Jews utterly to abolish the Idols of the Gentiles, for that they were forbid to take them to themselves; the Reason was, to create in the *Hebrews* the greater Detestation of their Superstitions, by supposing that the very touch of them was polluting: and not what was consecrated to strange Gods should be spared,

Angry, were left to the *Tarentines*. Hither may be referred what we lately quoted out of *Tertullian*, and this of him. *ad nationes* 2. So many Triumphs over Gods, as Nations. and the Images remain Captive. and surely they perceive whom they do not love.

(g) *Fulvius*.] See *Polybius* Extract, Legat. 27.

(h) The robbing of the Temples.] See *Cromer* B. 17. of the Goods of the Church of *Antioch* taken by *Chosroes*. See *Procop.* *Persic.* 2.

spared, (i) as Josephus *expounds* it, doubtless in Flattery to the *Romans*, as he does in the Exposition of another Precept, of not naming the Gods of the Heathen, which he explains by not speaking reproachfully of them; whereas their Law expressly forbids them to name them with any Honour and Reverence, or not without Abhorrence. For the *Hebrews* perfectly knew, by the immediate Instruction of God himself, that there resided in those Images neither the Spirit of God, nor good Angels, or any Virtue of the Stars, as the deluded Gentiles imagined; but wicked *Demons*, and such as are destructive to Mankind. Therefore *Tacitus* justly said, in describing the Rites and Ceremonies of the Jews, *All things Sacred to us, are Profane to them*. No wonder then if we read of so many Idol-Temples burnt by the *Maccabees*. So also *Xerxes*, when he destroyed the Idols of the *Grecians*, did nothing against the Law of Nations, tho' the *Grecian* Writers cry out upon it as a heinous Crime. For (k) the *Persians* did not believe there was any Divinity in them, they worshipping the Sun as the only God, and Fire as a Ray of his Deity. By the *Hebrew* Law, as the same *Tacitus* rightly observes, *none were allowed to enter the Temple but the Priests only*.

5. But *Pompey*, says the same Author, entered the Temple by the Right of Conquest; or as *St. Augustine* relates it, *not with the Devotion of a Suppliant, but by the Right of a Conqueror*. He did well to spare the Temple, and the Treasures of it, tho' as *Cicero* elegantly said, out of meer Shame, and to avoid Occasions of Reproach; not out of any

Reve-

1 Mac. 5.
10.

(i) *Josephus*.] *Antiq. Histor.* 4. 8. and the Book against *Appion*.

(k) *The Persians did not believe that there was any Divinity in them*.] *Dionysius Laertius* in the beginning, *The Images were condemned by the Magi*.

Reverence; but he did ill to enter it again, as in Contempt of the true God, which the Prophets so highly blame the *Chaldeans* for; for which cause some think it was so ordered by the Divine Providence, that the same *Pompey* should be killed at *Casius*, a Promontory of *Egypt*, as it were in sight of *Judea*; but if we take the Opinion of the *Romans*, there was nothing done by him against the Law of Nations. So *Josephus* mentioning the Destruction of the same Temple by *Titus*, adds that it was done τῷ τῷ πολέμῳ νόμῳ, by the Right of War.

III. What we have said of things Sacred, may also be understood of things Religious, for these also do not belong to the Dead, but to the Living, whether of a People, or a Family. Wherefore as *Pomponius* well observes, as Places are taken by the Enemy, tho' Holy, so whatsoever is Religious in those Places ceases to be so (upon their being taken); and *Paulus* the Lawyer says, *The Sepulchres of our Enemies are not Religious to us, and therefore we may take the Stones thereof, and put them to any use.* Which yet is so to be understood, that no Violence be offered to the Bodies of the Dead, which we have shewed in another place to be forbidden by the Law of Nations.

III. *Yes, and things Religious, adding a Caution.*

IV. This I shall also here repeat, that the Goods of our Enemies may be taken away from them, not only by plain Force, by the Law of Nations, but even by Fraud, so it be without Treachery; nay, in this Case, we may use the Perfidiousness of others. I must needs say the Law of Nations begins so to connive at such small and common Liberties, as the Civil Law does at Whoredom, and unreasonable Usury.

IV. *How far Fraud may be used in this Case.*

C H A P. VI.

Of the Right to things taken in War.

I. *What
the Law of
Nature is,
concerning
things taken
in War.*

BESIDES the Impunity of some Acts allowed to be used against our Enemies, of which we have treated hitherto; there is also another Effect, which by the Law of Nations is more proper to a Solemn War. And indeed by the Law of Nature those things may be acquired by a Just War, which are (a) either Equivalent to that, which tho' due to us, we cannot otherwise get, or which damnifies the Injurer, but within (b) the bounds of a just Punishment, as has been said elsewhere. By virtue of his Right Abraham (c) offered unto God the tenth of his Spoil he took from the five Kings, Gen. xiv. as the Author to the Hebrews expounds it, Heb. vii. 4. and thus did the Grecians, Carthaginians and Romans to their Gods, as to Apollo, to Hercules, to Jupiter Feretrius. The Patriarch Jacob leaving an especial Legacy to Joseph above his Brethren, *I give to thee* (says he) *one part above thy Brethren which I took out of the hand of the Amorite, with my sword and with my bow,* Gen. xlviii. 22. where (d) the word, *I took*, seems to be taken prophetically spoken for *I shall surely take*, and this attributed to Jacob, which was done after by his Posterity, who were called by his Name, as if the Ance-

(a) *Which are either Equivalents to that which tho' due to us, we cannot otherwise get*] B. 2. Cap. 7. § 2.

(b) *Within the bounds of a just Punishment.*] R. 2. Cap. 10.

(c) *Offered unto God the tenth.*] Food to his Servants, and part of the Spoil to his Confederates. See Josephus in his History, and what follows, Cap. 16. 3.

(d) *The word I took.*] The Chaldee Paraphrase expounds it done by his Prayers to God, who by his special Favour preserved Sickness for Jacob and his Posterity.

Ancestor and his Children were but one and the same Person. Which is much better than to wrest these Words, as the Jews do, to that plundering of the *Sichemites*, which had been done long before by the Sons of *Jacob*; for that, as being done treacherously, *Jacob* did ever religiously condemn, as we may see, *Gen. xxxiv. 30. and xlix. 6.*

2. Now that this Right to the Spoils taken in a Just War, was approved of by God, within the natural bounds prescribed, (as I said) will appear, by other places also of Scripture. God in his Law, *Deut. xx. 14.* concerning a City, which upon refusal of Surrender was afterwards taken by the Sword, thus orders, *Thou shalt take the spoil of it to thy self, and shalt enjoy the prey of thine Enemies, which the Lord hath given thee, 1 Chron. v. 20, 21, 22.* Also the *Reubenites* and *Gadites*, and half the Tribe of *Manasseth* are said to have conquered the *Itureans* and their Neighbours, and to have taken much Spoil from them: This being added as a Reason, because in the fight they called upon God, and he was Propitious to them. Which is also said of good King *Asa* calling upon God, he obtained the Victory over the *Ethiopians* that had unjustly warred against him, and carried away much Spoil, *2 Chron. xiv. 13.* which is the more remarkable, because he had taken up Arms, not by the Special Command of God, but out of Common Right.

3. *Joshua* also encouraging the *Reubenites*, *Gadites*, and half the Tribe of *Manasseth* before mentioned in their happy Successes, said, *Divide the spoil of your enemies with your brethren, Jos. xxii. 8.* And when *David* sent to the Elders of *Israel* the Spoil taken from the *Amalekites*, he gave it this honourable Title, *a Spoil taken from the Enemies of the Lord.*

With-

Without Dispute then, as *Seneca* said, to enrich Men with the Spoils of their Enemies is most honourable. We have also Divine Laws for dividing such Spoils, *Numb. xxxi. 27.* And *Philo* reckons it among the Curses of the Law, that their Fields should be reaped by their Enemies, whence must follow *λιμὸν μὲν φίλοις, ἰχθροὺς δὲ περισσοῖαν*, Famine to their Friends, and Plenty to their Enemies.

II. What
the Law of
Nations is,
of which
Examples
are given.

II. 1. Moreover, by the Law of Nations, not only he that makes War for a just Cause, but every Man in a Solemn War, is to all Intents and Purposes Master of what he takes from the Enemy, namely in that Sense, that both he and his Assigns are to be defended in Possession of them by all Nations; which Right, as to the External Effects of it, may be called Dominion. Thus said *Cyrus* in *Xenophon*, νόμος ἐν πάσιν ἀνθρώποις αἰεὶ ὁ αὖτος ἐστίν, &c. It is an eternal Law with all Men, when a City is taken by force, the Goods all belong to the Conqueror. And so *Plato*, πάντα τῶν νικωμένων ἀγαθὰ τῶν νικωσῶν γίνεσθαι, All that belonged to the Conquered, now belong to the Conqueror. And in other places, among several, as it were, kinds of Natural Acquisitions, he places πολημικὴν, that got by War, which he also calls χηριστικὴν by Robbery, ἀγωνιστικὴν by Combat, and χειρωτικὴν by Boxing. To which agrees *Xenophon*, in whom *Socrates* brings *Euthydemus* by divers Interrogatories to this Confession, that it was not always unjust to Spoil, when against an Enemy.

2. And in *Aristotle*, ὁ νόμος δημοκρατία, τις ἐστὶν ἡ τὰ κατὰ πόλεμον κεραιμένα τῶν κεραισιντων ἢ φάσι, The Law of Nations, as by a general Agreement, has allowed, that the Goods and Effects of the Conquered should become the Conquerors. As also that of *Antiphanes*, ὅτι τοῖς πολεμοῖς, &c. We ought to wish our Enemies abundance of Riches without Valour, for they will have other Owners, not the present Possessors,

but

but their Conquerors. (e) And Plutarch observes in the Life of Alexander, τὰ τῶν ὑποταγμένων αὐτῷ τε εἶναι καὶ παρασχεσθῆναι τῷ νικῶντι. What did belong to the Vanquished, is and ought to be esteemed the Reward of the Victors. And in another place, τὰ τῶν ὑποταγμένων αὐτῷ ταῖς μάχαις ἐχθρὰ τοῖς νικῶσιν ἀδελὰ παρασχεσθῆναι. The Goods of those overcome in War are the Reward of the Victors. Which are the Words of Xenophon, in his second Book of his Institution of Cyrus. And Philip in his Letter to the Athenians says, πάντες τὰς πόλεις, &c. All of us enjoy Cities, which were either left us by our Ancestors, or we became Masters of by the Right of War. Also Æschines, εἰ ψυὴ πρὸς ἡμᾶς πολεμήσας, &c. If you fight with us, and take our City by Arms, you justly possess the Rule over it by the Law of War.

3. Marcellus in Livy declares, that what he took from the Syracusians (f) he did it by the Right of War. The Roman Ambassadors told Philip, concerning the Cities of Thrace, and some others, if he had taken them by War, he might enjoy them by the Right of War, as the Reward of his Victory. And Massinissa pleads, the Land which his Father conquer'd from the Carthaginians he held by the Law of Nations. So Mithridates in Justin, he had not called his Son out of Cappadocia, which as a Conqueror he possess by the Rights of Nations. Cicero tells us, that Mitylene became the Romans by Right of War and Victory. He likewise says, that some Things

(e) And Plutarch observes in the Life of Alexander] In the same place that the Conquerors acquire to themselves what belonged to the conquered.

(f) He did it by the Right of War.] Diodorus Siculus Extract Peiræ, Num. 467. What was got by Arms, and the Right of War, is not to be parted with. The Goths in Agathias B. 2. of Theodoric the King after he had vanquished Odovacar, By the Right of War possessed all that belonged him.

Things may become a *Private Property*, either by *Seizure*, where they are without an Owner, or by *War*, when one Party proves *Victorious* over the other. And *Dion Cassius*, τὰ τῶν ἡττημένων τοῖς νικητοῖσι προσγινέσθαι, *what was the Conqueror's, become the Conqueror's*. And *Clemens Alexandrinus* informs us, that the Goods of Enemies are taken and possessed by the Right of War.

4. *What is taken from the Enemy by the Law of Nations, immediately becomes the Captors*, is the Opinion of *Cajus the Lawyer*. *Theophilus* in his *Greek Institutions* calls it φυσικὴν κτῆσιν, *a natural Possession*, as *Aristotle* had called it, πολεμικὴν φύσει κτῆσιν, *A warlike Possession by Nature*, because it respects no other Cause, but the bare Fact it self; and from thence arises a Right, as *Nerva the Son*, by the Testimony of *Paulus the Lawyer*, declared the Dominion of all things begun from a Natural Possession, and the Footsteps of it remain still in wild Creatures, whether on the Earth, in the Sea, or in the Air; as also in Spoils or Prisoners taken in War, all which are the Right of those who are the first Possessors of them.

5. Besides, those things are supposed to be taken from an Enemy, which are taken from the Subjects of an Enemy. So *Dercyllides* argues in *Xenophon*, since *Pharnabazus* was an Enemy to the *Lacedemonians*, and *Manca* a Subject to *Pharnabazus*, therefore the Goods were just Prize by the Law of Nations.

III. How
moveable
Goods are
said to be
taken by the
Right of
Nations.

III. 1. Moreover, by the Consent of Nations, things are then said to be taken in War, when they are so detained, that the first Owner has lost all probable hopes of recovering them, and cannot pursue them, as *Pomponius* determines a like Question. But this is presumed in Things moveable, that they are taken, as soon as ever they are carried within the Enemies Garrisons.

For

For in the same manner a thing is lost, that it returns by Postliminy; but it returns as soon as it begins to be within the bounds of the Country, or, as it is explained in another place, within the Garrisons. And *Paulus* the Lawyer affirms, that Man to be taken, that is carried out of our Bounds. And *Pomponius* declares, that Man to be taken in War, whom the Enemy has taken from ours, and carried to their own Garrisons; for 'till they have secur'd him within their Garrisons, he is reputed our Subject.

2. And by this Law of Nations there is the same Reason for Goods as Persons, whereby we may easily perceive, that in some Places things taken are said immediately to be the Captors, upon condition, that they continue so long in their Possession; whence it seems by Consequence, that at Sea, Ships and other things are then said to be taken, when they are brought into the Enemies Harbours, or the Place where their whole Navy rides, for then there is no hope of Recovery. But by a later Law of Nations, particularly the *European*, they are accounted lost, (g) if they continue twenty four Hours in the Enemies Possession.

IV. 1. But Lands are not said to be taken, as soon as they are seized on; for tho' it be true, that that part of Land, (as *Celsus* observes) which the Enemy with a strong Army encamps on, is for that time possess'd by them; yet every Possession is not sufficient for the Effect which we are now

IV. When Lands said to be acquired.

VOL. III.

H

treating

(g) If they continue twenty four Hours.] You may also find it to be observed in *Lands*, out of *Thuanus*, B. 113. in the Year 1595. It came from the *German Laws*, according to what was enacted by them with Reason concerning a wild Beast that is wounded, as by the *Law* of the *Lombards*, B. 1. tit. 22. §. 6. The same was observed in *England*, and the *Kingdom of Castile*, says *Alberick Gm.* *dispan.* Advocat. B. 3.

treating of, but such a one as is secure only: Therefore the *Romans* were so far from thinking that part of Land without the Gate to be entirely lost, whereon *Hannibal* Encamp'd, that at that very time they sold it to its full value. That Land then is reputed lost, which is so secured with Fortifications, which without being forced cannot be re-possess'd by the first Owner.

2. And this derivation of the word Territory given by *Siculus Flaccus*, à *terrendis Hostibus*, from terrifying the Enemy, seems as probable as that of *Varro*, à *terendo*, from tiring; or that of *Frontinus*, à *terrâ*, from the Earth; or that of *Pomponius* the Lawyer, à *terrendi jure*, from that Power to terrify which the Magistrates have. Thus *Xenophon* in his Book concerning Tributes, says, that the Possession of Lands is held in time of War, by Fortifications, which he himself calls *τάχην καὶ ἰσχυρά*, Walls, and Garrisons.

V. Things
not our Enemies
are not
to be acquired
by War.

V. This is plain, before the Right of War can entitle us to any thing taken, it is requisite that our Enemy had first the true Propriety of it: for what things may be within the Enemies Garrisons, or Towns, the Owners thereof being neither Subjects to our Enemies, nor at War with us, cannot by War be made lawful Booty; as is proved, among others, by the Saying of *Æschines*, that *Amphipolis* being a City belonging to the *Athenians*, could not be lawfully taken by King *Philip*, in a War which he made with the *Amphipolitans*; for there was no Reason for it, and the changing of Properties by meer Force, is too hateful to be produced.

VI. What
of things
found in
Enemies
Ships.

VI. Wherefore the common Saying (b) that Goods found in our Enemies Ships are reputed theirs,

(b) That Goods found in the Enemies Ships are reputed theirs. But neither do the Ships of Friends become lawful Prize on the account

not so to be understood, as if it were a certain Law by the Right of Nations, but because it occasions a great Presumption that they are so, which yet by evident Proofs to the contrary may be taken off. And so it was formerly adjudged in *Holland* in a full Senate, during the War with the *Hanse Towns*, in the Year 1338, and from thence hath pass'd into a Law.

VII. 1. But this is certain, if we only respect the Law of Nations, what we take from our Enemies, cannot be claimed by those, from whom our Enemies before had taken them; because the Law of Nations had first made our Enemies Lords of them by an outward Right, and so us. By which Right, among others, *Jephtha* defends himself against the *Ammonites*, because the Land in dispute was taken from the *Ammonites*; as also another part of the Land of the *Moabites*, by the *Amorites*, by the Right of War; and from them, by the same Right, by the *Hebrews*. (i) So *David* challenges, and divides as his own, the Spoils which he had taken from the *Amalekites*, and they before from the *Philistins*.

VII. Things taken from our Enemies are ours by the Law of Nations, tho' they took them from others.

H 2

2. Titus

account of the *Enemies Goods*, unless it be done by the consent of the Owners of the Ship, l. citem. D. de publicanis *Rodericus Zuavius Lib. de usu Maris*, consil. 2. num. 6. And so I take the Law of *France* should be understood, which made Prize of the Ships separate from the Goods, and of the Goods from the Ships, such as those of *Francis I.* made in the Year 1543. cap. 42. *Henry VIII.* in the Year 1584. in the Month of *March*, cap. 69. the Law of *Portugal*, B. 1. tit. 18. otherwise the Goods only are made Prize. *Mourissus Danic. B. 2.* So in the War between the *Venetians* and *Genoese*, the Ships of the *Grecians* were searched, and the Enemies taken out, if any were there, *Gregoras, B. 9.* See also *Cranzinius Saxon 2.* and *Alberick Gentil. Advocat. Hispan. B. 20.*

(i) So *David*.] So *Rezin* King of *Syria*, having the City *Eloth*, which had belonged to the *Idumeans*, gave it to be inhabited not by the *Idumeans*, but the *Syrians*, according to the Exposition of *Masoret*, 2 Kings 16. 6.

2. *Titus Largius*, (as *Dionysius Halicarnassensis* relates it) thus gave his Opinion in the Roman Senate, (k) when the *Volscians* laid Claim to some Lands which the *Romans* had won by the Right of War, because they had been formerly theirs, Ὅτι ῥωμαῖοι καλλίστας ὑπολαμβάνομεν, &c. *We Romans account the Possessions won by the Sword most just and honest; neither can we be easily perswaded foolishly to deface the Monuments of our Ancestors Valour, as to return them to those that cannot defend them. Nay, those very Lands we ought not only to communicate to our Citizens now alive, but to leave them to our Posterity; so far are we from parting with them, (by a voluntary Surrender) which use to be adjudged against Enemies. This also is plain from the Answer the Romans gave the Aurunci, ἡμεῖς δὲ ῥωμαῖοι δίκαιόμεν, &c. We Romans think it just, that whatsoever a Man wins by his Valour from his Enemies, he may leave to his Children, as being his own by a very good Title. In another place the Romans answer the Volsci thus, ἡμεῖς δὲ κερταίας ἡγούμεθα κτήσεις ἅς ἀνὴρ πολέμῳ κερτήσαντες λαβώμεν, &c. But we account those our best Estates, which we conquer from our Enemy; since they are ours, not by our own Laws only, but a Title derived rather from the Gods than Men, and allowed by the constant Practice of all Nations, both Greeks and Barbarians; we shall therefore yield up nothing cowardly, of what we have purchased valiantly; for it would be a great Disgrace to us, if either through*

Fear,

(k) *When the Volscians.*] *Plutarch* relates the same of the Veil in the Life of *Romulus*, the Veil gave occasion of the War, by demanding that the City of *Fidenæ* should be restored to them, as to the right Owners. But this was not only unjust, but ridiculous, that they who would not assist the *Tidinate*s, whilst they were engaged in a dangerous War, but suffered them to be killed, should now claim their Houses and Lands, from those who had got possession of them by War.

Fear, or Folly, we should quit what we have won by Bravery and Valour. So in the Answer of the Samnites, *πολέμῳ καὶ ἰσχυρίῳ ἡμῶν ὅτι ἐπὶ τοῦτο ἡμεῖς δικάσμεθα*, *We have gained this by War, which Law of Acquisitions is the justest.*

3. Livy speaking of Land near Luca, divided by the Romans, says, *That Land had been taken from the Ligurians, and it had been the Etrurians before it was the Ligurians.* By this Right the Romans held Syria, as Appian observes, not restoring it to *Antiochus Pius*, (1) from whom Tigranes, an Enemy to the Romans, had taken it; and Justin out of Trogus, brings in Pompey returning this Answer to the same *Antiochus*, *As he took not the Kingdom from him, so having beat out Tigranes, he would not give it to one that could not defend it.* So (m) those parts of Gallia, which the Cimbri had taken from the Gauls, the Romans afterwards taking, held as their own.

VIII. But here is a more difficult Question, to whom do the Spoils taken from the Enemy in a Publick and Solemn War belong, whether to the People in general, or to each Person of and among the People? The modern Expositors of the Law here vary very much in their Opinions; for most of them finding in the Roman Law, that the things taken

VIII. *That things taken from the Enemy, are not always theirs, that take them.*

H 3 become

(1) *From whom Tigranes.*] In Appian thus, *It is not just that the Seleucidæ, who had been ejected by Tigranes, should enjoy Syria, rather than the Romans, who had vanquished Tigranes.* And in another place, *He believed, that now he had expelled the Conqueror of Antiochus out of the Country, by so doing, had acquired it to the Romans.* And *Antiochus* himself in Polybius, in *Extract. Legat. num. 72.* esteemed the most sure and just Possession, that which was got by War.

(m) *Those parts of Gallia.*] The Franks did not restore to the Romans that part of Italy, which they took from the Goths. Procop. Goth. 4. See what the King of Sweden says in Thuanus, B. 76. in the Year 1582.

become the Captors; and in the Canon Law, that the Spoils are to be divided by publick Determination, do say, one after another, (as is usual) that tho' principally, and by Original Right, the Captor has the best Title to them, yet they are to be brought to the General, and he is to distribute them among the Soldiers. Which Opinion, not less common than false, I shall take the more care to confute, that we may see how unsafe it is in such doubtful Controversies to rely upon so weak an Authority. For doubtless if Nations please, this Question may be determined either way, that the things taken should belong to the People that bear the charge of the Wars, or to the first Captor; but the Question is, what the Law of Nations seems to speak in this Case; and the Goods of an Enemy, by the consent of Nations, are no otherwise allow'd their Enemies that take them, than as things without a Proprietor; as we have before explained from the Saying of Nerva's Son.

IX. That naturally both Possession and Dominion may be acquired by another.

IX. 1. The Things that are no bodies, indeed become the Captors; but they may be called Captors, who employ others to take them, as well as they who take them themselves. So they who are employ'd by others to catch Fish, Fowl, Deer, or Pearls, as Servants, Children, and sometimes Free-men, take them for those that employ them. *Modestinus* the Lawyer said well, *Whatsoever is naturally gained, as Possession is, we may gain by any one whom we will appoint to do it for us.* And also *Paulus*, *We acquire Possession by the Mind, and by the Body; the Mind I mean our own, but the Body may be either our own, or another's.* And in another place, *Possession may be taken by a Proctor, Attorney, or Guardian, provided it be with the design of making it ours.* So among the Greeks, they that overcame in the Olympic Games, gained the Prizes, not for them

themselves, but for them that sent them. The Reason is, because one Man may make use of another, as his Instrument, if both are willing, as we have declared in another Place.

2. Wherefore the difference said to be between Freemen and Slaves, in respect to Acquisitions, regards only the Civil Law, and properly belongs to Civil Acquisitions, as appears from the afore-quoted place of *Modestinus*. And yet the Emperor *Severus* brought these nearer to the Pattern of natural ones; not only for Profit, as he himself acknowledges, but for a Reason of Law; therefore setting aside the Civil Right, that Saying holds true, that what a Man does himself for himself, he may also do by another, and it is the same thing to do it by another as by himself.

X. We must then here distinguish between the Acts which in a War are truly publick, and private Acts that are done by the occasion of a publick War. By these private Acts the Goods of an Enemy principally and directly belong to the private Soldier, by the other to the People. Upon this Right of Nations *Scipio* argues with *Massinissa* in *Livy*, *Syphax has been vanquished and taken by the Conduct of the Romans; therefore he, his Wife, Kingdom, Lands, Towns, and their Inhabitants, and in a word, whatsoever belonged to Syphax, is become lawful Prize to the People of Rome.* And thus did *Antiochus* the Great plead, that *Cælo-Syria* did of Right belong to *Seleucus*, and not to *Ptolemy*, for that *Seleucus* maintained the War, to whom *Ptolemy* was but an Assistant, according to *Polybius* in the 5th Book.

X. A distinction of Actions done in War into publick and private.

XI. 1. The Soil and its Productions are not usually taken, but by some publick Act, as by bringing on it an Army, or by planting of Garrisons; therefore as *Pomponius* answered, *Lands taken from the Enemy fall to the State, that is, as*

XI. The Land taken, is his that maintains the War,

he explains it, is not part of the Prey, strictly taken. Thus Salomo, a Lieutenant General, (n) in Procopius, *ὡς τὰ μὴ ἀνδράποδα, &c.* That Prisoners, and all other Moveables, should be a Prey to the Soldiers, is not unreasonable, (so it be done by publick Grant, as we shall hereafter explain it) but that the Lands should belong to the Prince and the Roman Empire.

2. (o) So among the Hebrews and Lacedemonians, Land taken in War was divided by Lot. Thus the Romans either kept the Lands taken in War to let out, (a small part of it sometimes being left for Honour's sake to the former Owners), or sold them, or assigned them to Husband-men, or made them Tributary; whereof you may find many Testimonies in their Laws, Histories, and Commentaries of their Surveyors. Appian in his first Book of the Civil War tells us, *Ῥωμαῖοι τὴν ἰταλίαν πολεμῶ χειρήμενοι γῆς μέρος ἐλάμβανον*, When the Romans had conquered Italy, they took away part of their Lands. And in his second Book, *ἢ ὃ πολεμίων ὅτε κρατήσασιν ἐπὶ τῶν ἀπασαν τὴν γῆν ἀπαρνήσονται ἀλλ' ἐμερίζουσιν*, Having subdued their Enemies, they did not take away all their Lands, but a part. And Cicero in his Oration to the Chief Priests for his own House, observes, that their Generals having conquered an Enemy, sometimes Consecrated his Lands, but by the Decree of the People.

XII. 1. But

(n) In Procopius.] Vandal. 2. Sec. &c. Also (the Emperor) Severus gave the Lands conquered from the Enemies, to the Captains and Soldiers of the Frontier Garrisons, as Lampridius observes. In the Helvetic League it was stipulated, that the Towns and Forts taken, should belong in common to the Counties, as it is in many places in Simler.

(o) Among the Hebrews.] Among them, of Lands taken in War, the King's part was as much as that of a whole Tribe; see mark'd in Digest. Talmud. tit. de Rege.

XII. 1. But things moveable, and those that move themselves, are either taken in Publick Service, or out of it. If they are not taken in publick Service, they are the private Captor's. And hither we may refer that of *Celsus*, *Whatever among us was the Enemies, belongs not to the State, but to the Captors*. For the same was observed of Men, when they were in this case valued as Goods taken. There is a remarkable Passage in *Tryphonius* to this purpose. *But they who in times of Peace came to dwell in another Country, upon the sudden breaking out of a War, were made Slaves with them, among whom they were by their unhappy Fate taken as Enemies*; where we may observe, that the Lawyer attributes this to Fate, because they fell into Bondage (p) *without any Merit of their own*; for it is common to ascribe such things to Fate. So that of *Nevius*, *The Metelli were made Consuls of Rome by Fate*, that is, without any Merit of their own.

XII. Things that move themselves, and Moveables taken by a private Ad, are the Captor's.

2. Thus it is, when Soldiers take any thing from their Enemies, when they are not upon Duty, or executing the Commands of their Captain, but by permission of their Officer, or by a promiscuous Licence, that Soldiers often take on each side one against another; what is thus taken, is lawful Prize to the Captors, because they do not take them as under Command. Such are the Spoils taken in Rencounters, and in Excursions made freely without Command into an Enemies Country so it be ten Miles from the Camp, according to the *Roman Law*, (as we shall see presently) which the *Italians* to this Day call *Corratriam*,

(p) *Without any Merit of their own.*] So also *Servius* opposes these two on the first of the *Æneids*, *Adi fati, driven by the Destinies*. *Virgil* endeavours to attribute nothing to the Merits of the *Trojans*, but all to Fate.

riam, Rapine, and distinguisheth it from Butinum, Booty.

XIII. Unless the Civil Law otherwise Ordain.

XIII. And whereas we say, that by the Law of Nations, whatsoever is thus gained, becomes directly the Captors, it is to be so understood, that this was the Law of Nations, before any thing was decreed in this case by the Civil Law. For every State or People may otherwise determine of it among themselves, and prevent the Right of private Men, as we see done in many places concerning Wild Beasts and Fowl. So it may be ordained by Law, that whatsoever Goods of the Enemies are found among us, should be confiscated to the State.

XIV. What is taken by a publick Act, is his that maintains the War.

XIV. 1. But as to those things that a Man takes by an Act of War, the case is very different. For here every private Soldier represents the Body of the State, and executes the Business of the whole Political Body; wherefore (if the Civil Law does not otherwise provide) whatsoever either Possession or Dominion he takes, the State acquires it, and may transfer their Right to whom they please; which because it directly contradicts the common Opinion, I shall endeavour to confirm with the more authentick Proofs, from the Examples of the most celebrated Nations.

2. I shall begin with the *Greeks*, whose Custom *Homer* describes in several places.

Ἄλλα τὰ μὲν πόλιων ἐξεπράθαμεν, τὰ δ' ἰδύσαμεν.

The Cities sack'd, the Spoils we did divide.

Achilles in the same Poet, recounting the Cities, which he had taken himself, says,

Τῶν ἐκ πάσων, &c.

The

*The worthiest Spoils with our own Hands we took,
And rich they were; we bore them instantly
To Agamemnon; he behind the Ships
Divided some, but far the most reserv'd.*

For here we look upon *Agamemnon*, partly at that time Prince of all *Greece*, and so representing the whole Body of the People, by which Right he divided the Spoil, but with the Advice of his Council, and partly as General, and so out of that which was publick, he claimed a greater Share than others to himself. Therefore *Achilles* thus addresses *Agamemnon*,

Οὐ γὰρ σοὶ πρὸς ἴσιν ἔχω γέρας, &c.

*I don't pretend to equal Share with you,
If e'er the Grecians should proud Troy subdue.*

And in another place *Agamemnon*, by the advice of his Council, offers to *Achilles* a Ship laden with Brass, and Gold, and twenty Women, which he should take first out of the Spoil, when *Troy* was taken, as *Virgil* relates, *Aeneid* 2.

*There Phænix and Ulysses watch the Prey,
And thither all the Wealth of Troy convey:
The Spoils which they from ransack'd Houses brought,
And Golden Bowls from burning Altars caught:
The Tables of the Gods, the Purple Vests,
The People's Treasure, and the Pomp of Priests.*

Dryden.

So, long after, *Aristides* preserved the Spoil at *Marathon* entire. And after the Battle at *Plataea* it was strictly forbidden, that any Man should take to himself any part of the Spoil; and afterwards

wards it was distributed among the People according to every one's Deserts. The *Athenians* being subdued, *Lysander* brought the Spoil into the Publick Market. And (q) the *Spartans* had Publick Officers called *λαφυροπωλαι*, appointed to make Portfale of all the Prizes taken in War.

3. If we pass to *Asia*, *Virgil* tells us, that the *Trojans* used to divide the Spoil by Lot; as is usual where things held in common are to be divided among many. Otherwise the General had the dividing the Spoil, by which Right *Hector* upon *Dolon's* Request promised to give him *Achilles's* Horses; whereby we may perceive that this Right of gaining Propriety was not in the sole taking of the thing. The Spoil taken in *Asia* was brought to *Cyrus* being Conqueror, and so afterwards to *Alexander*. If we look into *Africk*, we there find the same Custom; so the things taken at *Agrigentum*, and at the Battle of *Canna* and elsewhere, were sent to *Carthage*. Among the old *Franks*, as we find in the History of *Gregorius Turonensis*, whatsoever was taken in War, (r) was divided by Lot. Neither had the King any other share than what the Lot gave him.

4. But

(q) *The Spartans had.*] Whilst *Agésilas* was employed in *Asia*, upon taking the Camp of *Pharnabazus*, *Spithridates* had withdrawn the Prey; Inquisition being appointed by *Erispidas* the *Lacedemonian*, he escaped.

(r) *Was divided by Lot.*] You have this in *Turonensis*, B. 2. Cap. 27. *Aymon*, B. 1. Cap. 22. and in the *Epitome* Published by *Freher*, Cap. 9. This was also an Ancient Custom of other Nations. *Servius* upon the 3d *Eneid*, *Sortitus pertulit illos*, because the Prisoners and Spoil were divided among the Conquerors by Lot. And upon *ducere sortem*, see *Johannes Magnus* of bestowing the Prey in common, and of clearing by Oath among the *Swedes* and *Goths*, B. 11. Cap. 2.

4. But by how much the *Romans* exceeded all other Nations in Military Discipline, so much the more do they deserve our Imitation. *Dionysius Halicarnassensis*, a most exact Observer of the Roman Customs, thus instructs in this Case, τὰ ἐν τῇ πολέμειῳ λάφυρα, &c. *Whatsoever our Valour has taken from the Enemy in War, the Law has decreed to be Publick, so that not only the private Soldiers are not Proprietors thereof, but not so much as the General himself; but a Questor received it, and in Publick exposed it to Sale.* These are the very Words of those that accused *Coriolanus*, though not free from Envy.

XV. (f) For it is true, that the People are the Right Owners of the Spoil. Yet it is as true, that the Power of disposing of it was in a free State left to the General, yet so, that he was to give an Account of it to the People. *L. Æmilius* says in *Livy*, that Cities taken by the Sword, not those that surrendered, were destroyed; but this at the Will of the General, not of the Soldiers. Yet this Power, which Custom has bestowed on the Generals; they themselves have sometimes, to take away all Suspicion, referred it to the Senate, as *Camillus* did; and they that have retained it, are found to have disposed it to several Uses, either for Religion, Honour or Ambition.

XV. That in such things some Power was left to the Will of the General.

XVI. 1. But they who desired to be, or be thought most Religious (u) would not at all meddle with the

XVI. Who either brings them to the Publick Treasury.

(f) It is true, that the People are the right Owners of the Spoil.] See also *Simler* in his *Helveticks* on this Subject.

(t) That the power of disposing of it was in a free State left to the General.] *Polybius* in *Extract. Peires* of *La. Æmilius Paulus*, when he was become Master of a whole Kingdom, and might dispose of all things according to his own Pleasure, he coveted nothing.

(u) Would not at all meddle with the Prey.] *Maricus Curius* swore, that he had touched nothing of the Prey, besides a Beechen Cup, in which

the Prey; but whether it were in Money, they ordered the Questor of the People to receive it, or other Goods, the Questor was commanded to sell them Publickly, and the Money arising from thence (called *Munibia*, Spoils, as *Favorinus* observes in *Gellius*) was by the Questor brought into the Treasury; but if there was occasion for a Triumph, it was first publickly shewed. And *Livy* in his 4th Book says of *C. Valerius* the Consul, *There was but a little Spoil* (because they had been often plunder'd, and had secured most of their Goods in Places of Safety) *this being publickly sold, the Consul ordered the Questors to put the Money into the Treasury.* *Pompey* did the same, of whom *Velleius* records, *He gave the Money that he had taken from Tigranes,* (*) *as his Custom was, to the Questor, and had it registred.* And so *M. Tully*, in his Letter to *Salust*, writes of himself, *Besides the Questors of the City, that is, the People of Rome, no Man has or shall touch the Prey that I have taken.* And this was generally done in their Ancient and best Times, to which *Plautus* alluding, says thus,

Nunc hanc praedam omnem jam ad Quaestorem deferam.

Now all this Spoil I'll to the Questor bring.

And likewise of Prisoners,

Quos

he sacrificed. The Writer of the Lives of famous Men, speaking of *Mummius* says, that he spoiled *Corinth* of her Images and Records, with which when he had filled all Italy, he carried nothing to his own House. *Plutarch* of the just mentioned *Emilius Paulus* says, that Men no less valued his Bounty, than greatness of Soul, that when he had gained from the Enemy a prodigious Mass of Gold and Silver, he would not so much as look upon it, but gave it to the Questors to carry into the Treasury.

(*) *As his Custom was.*] For the most part. See what shall be brought in the next Paragraph out of *Lucan*,

Quos emi de praeda de Quaestoribus.

Whom from the Quaestors of the Spoil I bought.

2. But other Generals did without a Quaestor sell the Spoil, and put the Money into the Treasury, as we may gather from the following Words of *Halicarnassensis*. So King *Tarquin*, when he had Conquer'd the *Sabins*, sent the Prey and Prisoners to *Rome*: So *Romulus* and *Veturius* the Consuls sold the Spoil to supply the Treasury, the Army repining at it. But in so common a Case as this, we need not bring any Examples to prove how much every General, either by himself, or the Quaestor, brought into the Treasury from the Triumphs over *Italy*, *Africk*, *Asia*, *Gaul* and *Spain*. But this is more remarkable, that the Spoil, or part of it, was sometimes given to the Gods, sometimes to the Soldiers, and sometimes to others. To the Gods were given either the Spoils themselves, as those which *Romulus* hung up to *Jupiter Feretrius*, or turned into Money, as *Tarquin* the Proud built the Temple of *Jupiter* on the *Tarpeian* Hill, with the Money raised from the Spoils of the City *Pometia*.

XVII. 1. To give the Spoil to the Soldiers, the old *Romans* thought a Sign of Ambition. So *Sextus* the Son of *Tarquin* the Proud, when retired to *Gabii*, is said to have distributed the Prey among the Soldiers, to make himself the more powerful. *Appius Claudius* in the Senate declared such Largeesses to be new, prodigal and unadvised.

XVII. Or divides it among the Soldiers, and how.

But the Spoil given to the Soldiers is either divided, or taken. It may be divided, either instead of Pay, (y) or to reward Merit. *Appius Claudius*

(y) Or to reward Merit.] *Josephus* tells us that it was practised among the *Hebrews*, B. 3. *Antiq. Histor.*

thus allowed the giving it in lieu of Pay; if that could not be done, the Spoils were Sold, and the Money brought into the Treasury. *Polybius* describes exactly the whole Order of this Distribution, namely, that one part of the Army was sent out in the Day-time, or in the Evening, to fetch in the Spoil, who were ordered to bring all they found into the Camp, that it might be equally divided by all the Tribunes, equal Shares being allowed to them who staid in the Camp (which King *David* made a Law among the *Hebrews*, 1 *Sam.* xxx. 24.) and also to those, who either by Sickness, or any Publick Employment, were then absent.

2. Sometimes the Spoil was turned into Money, and that, in lieu of it, was given to the Soldiers, which was often done in Triumphs. The Proportions I find thus, a single share to a Footman, a double share to a Captain (*of Foot*) a treble to a Horseman; sometimes a single one to a Footman, and double to a Horseman; otherwise a single one to a Footman, double to a Horseman, (x) and four shares to a Tribune, and Captain of Horse. There was also sometimes regard had to their Merit, as *Marcus*, because he had behaved himself gallantly, was particularly rewarded by *Posthumus* (a) out of the Spoils taken at *Corioli*.

3. Which way soever the Spoil was divided, (b) the General was allowed to take to himself *ἐξαίρετον*, a choice part, what he pleased; that is, what he thought

(x) And four shares to a Tribune, and Captain of.] To a Tribune and Captain of Horse, says *Appian*. *Civil.* 2.

(a) One of the Spoils taken at *Corioli*.] See *Plutarch* in the Life of *Coriolanus*.

(b) The General was allowed.] See *Leunclavius* in his *Turkish History*.

thought was honourable, (c) which also was sometimes granted to others for their Valour. Euripides speaking of the Trojan Ladies says,

Τοῖς πρῶτοισιν ἐξηρημέναι
Στρατῆς.

The fairest were given to the Princes.

And of *Andromache*,

Καὶ τῷ Ἀχιλλέως ἔλαχε πᾶσις ἐξοῦρετον.

She was a Prize for great Achilles' Son.

Ascanius of a Horse in *Virgil*,

*Ipsū illū olympū cristasque rubentes,
Excipiam fortī.*

*His Arms and nodding Crest,
And Shield from Chance exempt shall be thy share.*
Dryden.

Herodatus relates that noble Presents were given to *Pausanias* after the Battle of *Platea*, Women, Horses, Camels, &c. so King *Tullius* chose *Ocrisia*

VOL. III.

I

Corni-

(c) Which also was sometimes granted to others for their Valour.] So *Nestor* had a Woman for his Share.

ἣν οἱ ἄχαιοι
ἔτελον

Which the Greeks to him by Lot a Present made:

And in *Iliad* λ 114 but *Odysseus* Σ 14. *Ulysses* says,

Τῶν ἐξαιρέωμην Μενειτιάα, πολλὰ δ' ἐπ' ἴσας
ἄρχανον

*I chose the brave Menecce first, the rest
I took by Lot*

And

Corniculana for himself; and *Fabricius* (d) in his Oration to *Pyrrhus* in *Halicarnassensis* speaks thus, *ἐκείνων δορυχλήτων ἐξὸν μοι λαβεῖν ὅποσα βελούμην*, Of the Spoils taken in War, I may chuse what I please for my self. *Isidore* treating of the Right of War, has relation to this; where he says, He divides the Spoil, justly distributing with regard to the Persons, and their Performances, and the Prince's part. *Tarquin the Proud* (according to *Livy*) would both enrich himself, and pacifie the Minds of the People with the rest of the Spoil. *Servilius* in his Oration for *L. Paulus* said, he might have made himself rich by dividing the Spoil. And some think, that only the General's Part was called *Manubia*, Spoils, as *Asconius Pedianus* for one.

4. But those Generals are the more commendable, who quitting their own Right, have taken nothing of the Prey to themselves, as *Fabricius* lately mentioned, ἢ ἐν δίκαις πλεον ὑπερβολῶν ἐνεργήσας, preferring Glory even to just Riches, which he said he did in Imitation of *Valerius Publicola*, and a few others; whom *M. Porcius Cato* imitated in his Spanish Victory, saying, that he would take nothing to himself of the Prey, but barely what he eat and drunk, yet adding, that he did not blame those Generals who made use of the Advantage allowed them; but as for himself, he had rather rival the best of Men in Virtue, than the richest

And *Euripides* of *Cassandra*.

Ἐξαίρετόν νιν ἔλαβεν Ἀγαμέμνων ἀναξ.

King *Agamemnon* first did make his Choice.

Of those things, which out of the Prey were publicly ordered to be given to *Demosthenes* the *Athenian* General, see *Thucydides*, B. 2.

(d) *Fabricius*.] Whose Example *Julian* proposes both to himself and Soldiers, in *Ammianus*, B. 24.

in Wealth. Next to these are those Generals to be commended, who take to themselves some of the Prey, but moderately, as *Pompey* is praised by *Cato* in *Lacan*, who,

plura retentis

Intulit

He brought into the Treasury more than he kept.

5. In dividing the Spoil, they sometimes considered those that were absent, as *Fabius Ambustus* commanded at the taking of *Anxur*; and sometimes for an extraordinary Reason they were omitted that were present, as the Army commanded by *Minutius*, when *Cincinnatus* was Dictator.

6. But what Right the Generals had in the Ancient State, was translated to the *Field Officers*, as appears by *Justinian's Code*. Where from an Insinuation of Acts done, all Donations of Moveables, or of things moving themselves, which the Field Officers gave the Soldiers out of the Spoils of the Enemies, whether then occupied in the War, or in whatever Places they were known to abide, were all discharged.

7. But this Division proved often the occasion of Slander, as if the Generals by that means proposed to gain Favour to themselves; with which they charged *Servilius*, *Coriolanus* and *Camillus*, as if they had enriched their Friends and Clients out of the Publick Stock. They on the other side alledged that they had done it for the Publick Good, *ὅτι οἱ συναρπάμενοι τὰ ἔργα, &c.* That the Persons who took the Pains being rewarded for their Labour, might with more Courage undertake other Exploits; which are the words of *Halicarnassensis* on this Subject.

XVIII. 1. I now come to Plundering, which was granted to the Soldiers, either in wasting the

XVIII. or
suffer is to
be plundered.

Enemies Country, or after a Battle, or at the Storming of a Town, that upon a Sign given, they might run in immediately, which was rarely granted of old, and yet not without some Examples in those times. For *Tarquin* gave the City *Suesca* to be plundered by his Soldiers. So did *Q. Servilius*, the Dictator, the Camp of the *Aequi*. *Camillus*, the City of the *Veii*; *Servilius* the Consul, the Camp of the *Volsci*. Also *L. Valerius* gave Licence to plunder in the Country of the *Aequi*. So did *Q. Fabius* having routed the *Volsci*, and taken the City *Ecetra*, and several others afterwards. *Paulus*, the Consul, having conquered *Perseus*, gave the Spoil of those killed upon the Spot to his Foot, and that of the Country round about to his Horse. And by the Decree of the Senate he gave the Plunder of the (e) Cities of *Epirus* to his Soldiers. (f) *Lucullus* having vanquished *Tigranes*, a long while forbade his Soldiers plundering, but at last being assured of the Victory, he gave them leave to do it. *Cicero* in his first Book of Invention, among the Methods of acquiring a Right of Propriety, puts this, if any thing be taken from the Enemy, (g) whose part of the Prey has not been publickly Sold.

2. The

(e) *The Cities of Epirus.*] And so did *Sylla* to *Athens*, *Appian* *Mithrid.*

(f) *Lucullus.*] *Plutarch* relates that he gave the Plunder of *Tigranes* to his Soldiers; besides out of the Spoils 800 Drachmas given to each. *Severus* gave the Spoil of *Ctesiphon* to his Army. He also ordered the *Tribunes* and *Captains*, and the very Soldiers to keep to themselves what they got in the Streets, according to *Ellen* *Spartianus*. *Mahomet II.* promised both the Spoil of *Constantinople* and the Slaves, to his Soldiers.

(g) *Whose part of the Prey has not been publickly sold.*] *Varro* reckons six ways, by which one may become a lawful Master. 1. An Exchange on a just Inheritance. 2. A Selling before Witnesses. 3.

giving

2. They who do not like this Custom, say, that by this Licence to plunder, the greedy Soldiers often hinder the truly Valiant of the just Reward of their Bravery; and that we sometimes (b) see, the backwardest to Fight the most forward to Plunder; but they that have hazarded themselves, should expect the largest share for their dangerous Labours, which are the Words of Appian in Livy. To which let us add that of Cyrus in Xenophon, ἐν τῇ ἀπραγῇ ἐὶ καὶ οἱ ἐλάττωτοι πλεονεκτοῦσιν αὖ, In plundering I know the worst Soldiers get most. To this the general Answer is, what a Man takes from the Enemy with his own Hand, is more dear, and pleasing to him, than much more bestowed upon him by the Order of another.

3. Sometimes also plundering is granted, because it cannot well be hindred; as it was at the taking of Cortuosa, a Town of the *Hetrurians*, according to Livy. The Tribunes ordered the Spoil to be Sold, but the Command was too late for the purpose, for the Soldiers had already seized on it, and it could not be taken away without Envy. We also read, that the Camp of the Gallo-Greeks was plundered by the Army of C. Helvius, against the Will of the General.

XIX. What I said, that sometimes others who were no Soldiers partook of the Spoil, or of the Money arising from the Sale of it; this happens often, when some have contributed to the Maintenance of the War, and were to be reimbursed. And sometimes Plays were instituted out of the Money raised out of the Spoil.

XIX. Or
gives it to
others.

I 3

XX. 1. Nei-

giving up his Right. 4. A long Possession or Prescription. 5. A selling for Slaves out of a Booty. 6. By a Publick Auction, when the Goods of any one are sold by Confiscation or Forfeiture.

(b) The backwardest to Fights the most forward to Plunder.] See what we shall produce by and by out of Procopius, ad § 24.

XX. Or
dividing it
into parts.
disposeth of
some one
way. some
another, and
how.

XX. 1. Neither is the Spoil diversly disposed of, only when the Wars are divers, but the same Prey in the same War is appropriated to several Uses, distinguished either by its parts, or its kinds. So *Camillus* dedicated the tenth of the Spoil to (i) *Apollo Pythius*, in Imitation of the Greeks, who first learnt it of the *Hebrews*; at which time, under the Vow of *Tithing* the Spoil, the Chief Priests adjudged, that not only Moveables, but also Towns and Fields were included. The same *Camillus* having vanquished the *Falisci*, delivered the greatest part of the Spoil to the *Questor*, and reserved a small part for the Soldiers. So did also *L. Manlius* either sell the Spoil which he brought into the Publick Treasury, or with great care divided it among the Soldiers, as was most just; which are the Words of *Livy*.

2. The kinds into which a Prey may be divided are these: Prisoners (Men) Herds, Flocks (called properly in Greek *λίσια*, the Prey) Money and other Moveables, both rich and ordinary. 2. *Fabius* having overcome the *Volsi*, ordered the Prey and Spoils to be Sold by the *Questor*; but the Silver he shew'd in Triumph. And when he had subdued the *Volsi* and *Aequi*, he carried the Prisoners beyond the Bounds of *Tusculum*, and bestowed them on the Soldiers; and in the Fields of *Ecetra*, he left the Peasants and Cattle to be plundered. When *L. Cornelius* took *Antium*, he brought all the Gold, Silver and Brass into the Treasury; sold the Prisoners and the Prey by the *Questor*, and left to the Soldiers what was necessary for Food and Apparel. Not unlike to this was that of *Cincinnatus*, who having taken *Corbio*,

(i) To *Apollo Pythius*.] *Ammianus* also mentions it in *Extrac. Peires*.

a Town of the *Æqui*, sent the richest of the Spoil to *Rome*, the rest he divided by Companies. *Camilus* upon taking *Veii*, brought nothing into the Treasury, but the Money arising from the Sale of the Prisoners; and having conquered the *Hetrurians*, he sold the Prisoners, and out of that Money repaid the *Roman Ladies* what they had contributed to the War, and laid up three Golden Cups in the Capitol. And by *Cossus* the Dictator, all the Prey from the *Volsci*, except the Prisoners, was given to the Soldiers.

3. *Fabritius* having conquered the *Lucanes*, the *Brutii*, and the *Samnites*, enriched his Soldiers, restored the Taxes to the Citizens, and brought 100 Talents (k) into the Treasury. *Q. Fulvius* and *Appius Claudius* having taken *Hanno's* Camp, sold the Prey, and divided it, rewarding every one according to his Merit. *Scipio* at the taking of *Carthage*, gave his Soldiers the Plunder of the City, except the Gold, and the Silver, which he made Presents of. *Acilius* having taken *Lamia*, divided part of the Spoil (among his Soldiers) and sold the rest. *Cn. Manlius* having vanquished the *Gallo-Greeks*, and according to the Superstition of *Rome*, burnt their Arms, he ordered them all to bring in the Spoil, and sold it, part of which, as his own, he brought into the Treasury, and the rest divided most justly amongst his Soldiers.

XXI. 1. From what we have said, it appears, that no less among the *Romans*, than other Nations, the Spoil belonged to the People of *Rome*; but the disposing of it sometimes left to the Generals; yet so, (as I said before) they were to give

XXI.
Sometimes
the Publick
cheated of
the Spoil.

I 4

an

(k) Into the Treasury.] And *Fabius* the Money raised from the Sale of Men at the Sacking of *Tarentum*, when he divided the rest of the Prey among the Soldiers.

an Account of it to the People; which we may learn among others from the Example of *L. Scipio*, who, according to *Valerius Maximus*, was condemned of wronging the Publick, as having received 480 Talents of Silver more than he had brought into the Treasury, and of others which I have mentioned before.

2. *M. Cato* in his Oration concerning the Spoil, did (as *Gellius* observes) eagerly and notably complain of the Licence granted to their Generals, and their Impunity for cheating the Publick. Of which Oration there remains this Fragment, *Private Thieves are chained and fettered, but Publick Robbers pride it in Gold and Purple. And again, that he admired how any Man durst hang up in his own House Ensigns taken in War, as if they were his own Furniture.* Thus did *Cicero* charge *Verres* with the invidious Crime of defrauding the Publick, that he had appropriated to himself an Ensign, and that taken out of the Prey of the Enemy.

3. Neither were Generals only, but also private Soldiers accused of this Crime of robbing the Exchequer, if they did not openly produce what they had taken. For they were all, as *Polybius* says, bound by an Oath, *οὐδὲ τὴν μὴδὲν αὐτοῖς προσφίσεσθαι μηδὲν ἑκ τῆς διαπραγῆς, ἀλλὰ τηρεῖν τὴν πίσιν, καὶ τὸ ὄραον, that they should carry off nothing of the Prey, but honestly keep their Faith, as they had sworn.* To which we will refer the form of the Oath in *Gellius*, by which the Soldier is obliged to take away nothing within the Army, or ten Miles round, that was of more value than a Sesterse; or if he took it, to bring it to the Consul, or within three Days declare it publickly. Hence we may understand the meaning of *Modestinus*, *he that hath stolen away the Spoil from the Enemy, is guilty of wronging the Publick.* Which one Passage is enough to convince the

the Lawyers, that the Spoils taken from the Enemy do not peculiarly belong to the Captors; for it is plain there can be no robbing the State, but in things Publick, Sacred, or Religious. The Design of all this is to shew, that it may appear, (as I said before) that setting aside the Civil Law, and primarily, whatsoever is in the publick Acts of a Just War taken from the Enemy, belongs to the Prince or People who maintain the War.

XXII. 1. We added, *setting aside the Civil Law, and primarily, or directly*: The first, because the Law, whether made by the People, as among the Romans, or by the King, as among the Hebrews and others, may dispose of things not actually possess'd to the Benefit of the State. And here, under the Notion of Law, we comprehend also Custom, if rightly introduced. And the other, that we may know, that it is in the Power of the People to grant the Spoils to others, as well as other things; and that not only after Acquisition, but also before it, provided, that immediately upon the taking them Actions be commenced, *brevi manu, in a short form*, (as the Lawyers term it) which Grant may be made not only by Name, but also generally, as to Widows, Aged People, and poor Orphans, as part of the Spoil was given in the time of the *Maccabees*; or to uncertain Persons, in imitation of Gifts thrown among the People, which the *Roman* Consuls allowed to them that could catch them.

2. Neither is the transferring this Right, either by Law, or Grant, always a mere free Gift, but sometimes the payment of a Debt, or Satisfaction for Loss received, or by way of Reimbursement of Charges or Damages suffer'd in the War, either in Monies, or Pains, as when Allies or Subjects serve without Pay, or for less than their Labours deserve. For in these cases it is usual

XXII. That something may be changed of this Common Right by any Law, or Act of the Will.

XXII. That something may be changed of this Common Right by any Law, or Act of the Will.

usual to grant either the whole, or some part of the Spoil to others.

XXIII.

Some of the
Spoil may be
given to our
Allies.

XXIII. And our Lawyers observe, that silent Custom has so prevailed almost every where, that our Allies, or Subjects, who serve without Pay, and at their own Cost and Hazard, should enjoy what they take; (1) *The reason as to our Allies is plain*, because by the Law of Nature one Confederate is obliged to repair the Losses of another, suffered on the common or publick Engagement. Besides, few will take pains for nothing: Therefore (Seneca observes) *we pay Physicians, because we call them away from their own Affairs to serve us.* Quintilian says the same serves for Orators, (Pleaders) because they spend their whole Time and Study to defend other Mens Estates, and neglect all other means of improving their own. As Tacitus also remarks, *They neglect their own Affairs to mind those of other Men.* It is therefore very probable, (unless some other Cause appear, as pure Kindness, or some previous Contract) that the hope (m) of gaining the Enemies Spoils, as a Reward to their Pains and Hazard, made them undertake it.

XIV. Some-
times also
Subjects.
Approv'd
Examples.

XXIV. 1. The thing is not so plain as to Subjects, because they owe their Service to the State; but since not all, but some only, hazard themselves; therefore it is but just, that a Retribution be made by the whole Body, to those, who, more than the rest, undergo the Fatigues and Charges of the War, but much more the Damages attending it; in full return of which, the

(1) *The Reason as to our Allies is plain.*] Amalasuintha uses this in a Letter to Justinian, Goth. 1.

(m) *That the Hope of gaining the Enemies Spoils, as a Reward to their Pains and Hazard, made them undertake it.*] See Plutarch in the Life of Marcellus.

the hopes of the whole Prey, or of an uncertain part is readily granted to them, and not without Reason. Thus thought the Poet,

Præda sit hæc illis, quarum meruere labores. Prop.

Let them enjoy the Prey, who took the Pains.

2. (n) As to our Allies, we have an Example in the Roman League, whereby the Latins were admitted to an equal Share of the Spoils taken from the Enemy in the Roman Wars. So in the Wars wherein the Ætolians were assisted by the Romans, it was agreed, that the Towns and Lands should be the Ætolians, but the Romans have the Prisoners and Moveables. After the Victory over King Ptolemy, Demetrius gave part of the Prey to the Athenians. St. Ambrose treating of Abraham's Expedition, shews the Equity of this Custom, *He perhaps thought it just, that they who assisted him in the War, should partake of the Spoils, as a Reward of their Labour.*

3. As to Subjects, we have an Example in the Hebrews, among whom half the Prey was given (o) to them who were in a readiness, Num. xxxi. 27, 47. and 1 Sam. xxx. 22. So the Soldiers of Alexander claimed the Spoil taken from private Men to themselves, but any that was rare and precious they presented to the King; whence

(n) As to our Allies, we have an Example] The People of Rome allowed the Ancient Latins the Thirds of the Prey, Pliny, B. 39. The Helvetic Towns divide the Prey proportionably to the number of Soldiers, as Simler says. Proportionably to the Expence, the Pope, the Emperor, and the Venetians, divide in their War against the Turk, Paruta 8. Pompey conferred Armenia Minor on Deiotarus King of Galatia, because he had been a Confederato in the Mithridatic War.

(o) To them who were in a readiness.] The Pisidians gave part of the Prey to those that look'd after their Houses, Chalcond. B. 5.

we find them accused at *Arbela*, who conspired to rob the Publick, by appropriating the Prey to themselves, and to bring none into the Treasury.

4. But what publick things belonged to the Enemies, or their King, were exempted from this Licence. Thus the *Macedonians* having broke into *Darius's* Camp, near the River *Pyramus*, carried away an infinite Mass of Gold and Silver, and left nothing untouch'd, (p) besides the Royal Pavilion; it being a remarkable Custom among them, (says *Curtius*) to receive the Conqueror in the Pavilion of the conquered King. Not unlike the Custom of the *Hebrews*, who set the Crown of the conquered King on the Head of the Conqueror, 2 *Sam.* xii. 30. assigning to him (as we find in the *Talmud*) the Furniture of the King's Palace (or Pavilion) as his Share. We read of *Charles the Great*, when he had conquered the *Hungarians*, he gave the private Spoils to the Soldiers, but what belonged to the vanquished King, he brought into the Treasury. But the *Greeks* called the publick Spoils *λαφυρα*, as we shew'd before, the private *σπυλα*; their *σπυλα* were such as were taken in the heat of Battle; and *λαφυρα* when the Battle was over, a Distinction afterwards allow'd by other Nations.

5. But it is plain, by what I have said already, that the *Romans* in the early days of their State, did not allow so much to their Soldiers, but the Civil Wars indulg'd them with more Liberty. Thus *Equulanum* was given to be plundered by the Soldiers, by *Sylla*. And *Cæsar*, after the Battle of *Pharsalia*, gave *Pompey's* Camp to be pil-
laged

(p) Besides the Royal Pavilion.] See *Diodore*, B. 17. and *Plutarch* in the Life of *Alexander*. Also the like in *Xenophon*, 2. de *Cyr*, and his *War*, 4. and 7.

laged by the Soldiers, with this Compliment in *Lucan*,

— *Super est pro sanguine merces,
Quam monstrare meum est; nec enim donare vocabo,
Quod sibi quisque dabit.*

*Let each reward himself, there lie the Spoils,
The Claim of War, and of illustrious Toils.*

So the Soldiers of *Octavius* and *Anthony*, plundered the Camp of *Brutus* and *Cassius*. In another Civil War, the *Flavians* being led against *Cremona*, tho' it was now near Night, made haste to Storm the City, fearing least otherwise the Wealth of the *Cremonese* should fall to the share of their Commanders, and Legates; remembering the Advice of *Tacitus*, *The Plunder of a City taken by Storm belonged to the Soldiers, of one Surrendered to the General.*

6. But upon the decay of Discipline, the Soldiers had greater Licence of Plundering granted them, upon this account, least whilst the Victory was doubtful, the Soldiers should leave the Enemy, and fall to Plunder, which has often changed the Victory. When *Corbulo* had taken *Volandum*, a Castle in *Armenia*, *Tacitus* tells us, the common people were publickly sold, the rest of the Spoil fell to the Conqueror. In the same Author, *Suetonius* encouraged his Soldiers in the *British* War to pursue the Enemy, without any regard to the Spoil, assuring them, that when the Victory was fully gained, they should enjoy the whole. Such like Examples we frequently meet with, besides what we lately quoted (q) out of *Procopius*.

7. There

(q) Out of *Procopius*.] He in his second *Vandal*, relates, that the Soldiers were highly enrag'd against *Salomon*, when he warred against

7. There are some things of so small a value, that they do not deserve to be openly *cried*, these generally belong to the Captors, by the consent of the People: Such in the old *Roman State* were a Spear, a Javelin, Fuel, Fodder, Casks, Bellows, a Torch, and any thing else below the value of a small piece of Silver. For (as *Gellius* informs us) these things were expressly excepted in the Military Oath. Like to this the allowance to Seamen and Marines. The *French* call this the Spoil, or Pillage, and under it they include Apparel, Gold, and Silver within ten Targitiers. Sometimes a certain part is given to the Soldiers, as in *Spain*, one while (r) the Fifth, another time the Third, and sometimes half the Prize falls to the King; and the seventh, sometimes the tenth, to the General; the rest belongs to the Captors, (s) except Ships of War, which are all the King's.

8. Sometimes the Spoil is bestowed with regard to the Labour, Hazard, and Charge; as in *Italy*, the third part of a Ship taken belongs to the Master of the Ship that took it, a third to the prime Owners, and another to the Captors. Sometimes it happens, that they who at their own Charge and Danger maintain the fight, do not carry away all the Prize, but some part is owing

against the *Levata* for detaining the Prey from them; he pretended he did it, that when the War was ended, he might distribute to every one according to his Deserts; and *Goth. 2.* that all the Prey of *Picenum* was brought to *Belisarius*; that he might divide to every Man according to his Merits; giving the Reason, *that it is unjust, while some take pains to kill the Drones, that others without any Labour should eat the Honey.*

(r) One while the fifth.] *Leupelavius* declares this to be the Custom of the *Turks*, B. 3. and 5.

(s) Except Ships of War.] So are all Engines of War the King's among the *Goths*, *Johannes Magnus. Histor. Sued. B. 9. c. 2.*

owing to the State, or to him who derives his Right from the State. So in *Spain*, if any Ship be fitted out upon a private Charge, part of the Prize comes to the King, and part to the Admiral. So likewise by the Custom of *France* and *Holland*, the tenth part belongs to the Admiral, the fifth part of the Prize being first laid aside for the State. But now it is Customary at Land, in the taking of Towns, and in Battles, every one keeps what he takes; but in Excursions, whatsoever is taken, is divided among them that take it, according to the Merit and Dignity of each Person.

XXV. What has been said, may serve to let us understand, that if in any Nation, not engaged in War, a Dispute arise concerning any thing taken in War, the things shall be adjudged to him, whom the Laws or Customs of the People from whose Parts the Things were taken, shall favour. But if nothing can thereby be proved, then by the common Right of Nations the thing taken shall be adjudged to the People; if at least it were taken in the Act of War. For it is plain from what we have already said, that what *Quintilian* alledges for the *Thebans*, does not always prove true, that the Right of War has no Power on that which is reducible to a Tryal of Law, neither is it enough to gain it by Arms, unless it can be kept by Arms.

XXVI. 1. But whatsoever things do not belong to the Enemy, (1) tho' found among the Enemies, shall not be the Captors. For this (as I said before) is neither agreeable to the Law of Nature, nor was introduced by the Law of Nations. So the

XXV.
What use
may be
made of
what has
been here
said.

XXVI.
Whether
things ta-
ken out of
the Domi-
nions of ei-
ther Party
be lawful
Prize.

(1) *The found among the Enemies.*] See above, cap. 4. §. 7.

the Romans (in Livy) tell Prusias (u) if that Land had not been Antiochus's, it could not by Conquest belong to the Romans. But if the Enemy had any Right to the things adjoining to the Possession, as it may be by way of Pledge, or Security, or Service, that is no hindrance that it should not be the Captors.

2. This also used to be disputed, whether Things or Persons taken without the Territories of either Party engaged in the War, belong to the Captors. If we only respect the Right of Nations, I think the Place here can be no Security, as we have said, we may lawfully kill an Enemy anywhere. But the Sovereign of that Place may, if he pleases, prevent it; and if they will not obey him, may demand Satisfaction, as for an Injury done to himself. The like may be said of a Deer taken in another Man's Ground, but the Owner may deny to let him come upon his Land.

XXVII.

How proper is this Right to a solemn War.

XXVII. But this external Right of acquiring Things taken in War, is by the Law of Nations so peculiar to a Solemn War, that it has no force in other Wars. For in other Wars among Foreigners, a thing is not acquired by Virtue of the War, but in Satisfaction of some Debt, which otherwise could not be recovered. But in Civil Wars, whether they be great, or small, there is no change of Dominion, but by the Authority of a Judge.

(u) If that Land had not been Antiochus's, it could not by Conquest belong to the Romans.] So neither did that Land become Bocchus's upon the Victory over Jugurtha, which had belonged to Jugurtha, but to the Children of Bocchus, Appian. Hist. Lib. 28. See the like in Crantzius Saxon. 12.

CHAP. VII.

Of the Right over Prisoners.

I. 1. **T**HERE is no Man by Nature Slave to another, that is in his Primitive State considered, without any Personal Fact, (a) as I have said in another place; in which Sense we may take the Lawyers, when they say, that Slavery is against Nature; but it is not repugnant to natural Justice, that this Slavery might first be derived from some Fact done, that is, some voluntary Agreement, or for some Crime, (b) as we have also said already.

I. All Prisoners in a solemn War, are, by the Law of Nations, Slaves.

2. But by the Law of Nations, (which I am now treating of) Slavery is of a more large extent, both as to Persons and Effects. For if we consider the Persons, not only they who surrender themselves, or engage by Promise to do it, are reputed Slaves; but all Persons whatsoever taken in a solemn War, as soon as they shall be brought within our Garrisons, as Pomponius tells us. Neither is there any previous Crime required, nor here every ones Condition is alike, even of those who have unhappily been found among the Enemies, upon the sudden breaking out of the War, as I have said already. Polybius, of Prisoners, speaks thus, *τι δ' ἂν παρόντες ἑτοίμην δίκην ἀποδοῦσαν δέδωκται*, &c. *What must these Men suffer to make their Punishment just? If any* we say, *by being sold with their Wives and Children,*

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but

(a) As I have said in another place.] B. 2. c. 22. §. 2.

(b) As we have also said already.] B. 2. cap. 5 §. 27.

but so may they be (c) by the Law of Arms, who never injured us. And Philo observes the same thing πολλοὶ πολλάκις καιροῖς ἀβελήτοις τ' σφόδρα ἀσεβῶν ἐκ γένους ἀπέβαλον ἐλευθερίαν, *Many Men lost their natural Liberty by accidental Occasions.*

4. *Dion Pruseensis*, recounting the several ways of acquiring Dominion, says, τρεῖς δὲ κλήσεως τῶν περὶ, ὅταν ἐν πολέμῳ λαβὼν αἰχμαλῶτον τῆτον τ' τῶν πονέων ἐχὼ κατὰ δούλασθαι μενον, *the third is, when a Man has taken a Prisoner in War, by that means he makes him his Slave.* So *Oppian* calls the carrying away of Children Prisoners taken in War πολέμους νόμους *the Law of Arms.*

II. And their Posterity.

II. Neither do only they themselves become Slaves, but their Posterity for ever; for whoever is born of a Woman after she is a Prisoner is born a Slave: And this is what *Martian* said, that by the Law of Nations those that were born of Bondwomen are accounted Slaves. And *Tacitus*, speaking of the Wife of a German Prince (taken Prisoner by *Germanicus*) said, she had *Servitio subjectum uterum, a Womb subjected to Bondage*, that is, her Child would be a Bond-slave.

III. Any thing done to them is unpunishable.

III. 1. But the Effects of this Right are infinite, so that there is nothing that the Lord may not do to his Slave, as *Seneca* the Father said, no Torment but what may be inflicted on him with Impunity.

(c) By the Law of Arms.] *Servius* upon the 1st *Eneid* of *Hector* from whose Port when *Laomedon* would have beat him off, he was slain, and his Daughter *Hesione* taken away by the Right of War, given in Marriage to his Companion *Telamon*, who had first mounted the Wall of whom was born *Teucer*. Also upon the 10th *Eneid*, telling the same Story, The Greeks would not restore *Hesione* to the *Trojans*, alledging they had her by the Right of War; and *Josephus*, B. 1. when they were taken, not by the Right of War; and in another place by that Law which is made about Captives, says *Menander*. *Prologus*. You have many things relating hereto in the foregoing Chapters, because Writers join, or compare things taken, with Men taken.

punity, nothing commanded him but what may be exacted with the utmost Rigour and Severity; so that all manner of Cruelty may be exercised by the Lords upon their Slaves; but that this Licence is somewhat restrained by the Civil Law. *It is generally allowed by all Nations to the Lord, to have Power of Life and Death over his Slave, we are told by Caius (the Lawyer.) He also adds, that this large Power had been limited by the Roman Laws in their own Territories. Hither we may refer that of Donatus to Terentius, What may not a Lord lawfully do to his Slave?*

2. Not only the Person, but all things taken with him, become lawful Prize. A Slave that is in the Power of another, *Justinian* says, can call nothing his own.

IV. Hence the Opinion may be confuted (*d*), or at least restrained, which maintains that things incorporeal cannot be acquired by the Law of Arms. It is true, that Primarily, and of it self, they cannot, but they may be lost to the Person whose they had been. But we must except those things that proceed from a singular Propriety of the Person, and cannot be alienated, as the Right of a Father to his Son. For if these Rights are capable of remaining, they remain with the Person, if not, they are extinct.

IV. *The incorporeal Goods of the Slain become the Lord's.*

V. 1. Now this large Power is granted by the Law of Nations for no other Reason, than that the Captors being tempted by so many Advantages might be inclined to forbear that utmost

V. *The reason why this was ordained.*

K 2 Rigour

(*d*) Or at least restrained, which maintains that things incorporeal cannot be acquired.] *Val. Max. B. 6. cap. 9. 11. de Cn. Corn. Afrina.* who being Consul was taken Prisoner by the Carthaginians at Lipara, and so by the Right of War had lost all a Slave, losing the Dominion of her things as well as of himself. *Philo* says in his Book that every good Man is a Freeman.

Rigour allowed them by the Law, of killing their Prisoners, either in the Flight, or in cold Blood. As I said before (e) *The Name of Servants* (Pomponius tells us) arose from this, that Generals sold their Prisoners, thereby preserving them from Death. I said that they might be enclined to forbear, for there is no Argument to engage them to it, if we respect this Law of Nations, but a Motive drawn from Interest.

2. And for the same reason he has Power to transfer this Right to another, as he has that of any of his Goods. This Power also reaches to the Children born in Captivity, because if the Captor had been pleased to have used his utmost Power, he might have prevented their being born; and consequently those born before the Captivity of the Mother, (if they are not personally taken) do not become Slaves. Therefore by the Law of Nations Children follow the Mother's Condition, because their Chastity, being Slaves, is not provided for by any Law, nor secured by a strict Guard, so that it would be a very difficult thing to prove who is the Father. And so we must understand that of *Ulpian*, *The Law of Nature is this, that he that is born without lawful Marriage should follow the Mother's Quality*, that is, General Custom proceeding from some Natural Reason, hath formed it into a Natural Right, (a word sometimes abused) as we have shewed in another place.

3. But that this Law of Nations was not admitted without cause, we may gather from the Practice of Civil Wars, wherein Prisoners are generally

(e) *The Name of Servants arose from this.* See also *Servius* on the 5th *Eneid*, where he explains the Original of the word *Servus*.

nerally put to the Sword, because they cannot be made Slaves, which *Plutarch* well observed in the Life of *Otho*, and *Tacitus* in his second History (f).

4. But whether Prisoners should belong to the People, or to the Captors, must be determined from what we have said already of the Spoil; for the Law of Nations has in this Case equalled Men with Goods. So *Cajus* the Lawyer in his second Book, *Those things which are taken from the Enemy, by the Law of Nations are instantly the Captors, so also Freeman are made Slaves.*

VI. 1. I cannot agree with those Divines, who maintain that Prisoners taken in an unjust War, or their Children, may not lawfully make their Escape, unless it be to their own Friends. Here is the Difference, (g) if they can escape to their own Garrisons during the War, they recover their Liberty by the Right of Postliminy: But if to others, or to their own Country after the making of the Peace, they are to be delivered to their Masters upon Demand. But it does not therefore follow, that the Prisoners are bound in Conscience to return, for there are many Laws which are Obligatory only as to the External Judgment, such are those of War, of which we are now treating. Neither can one object, that from the very Nature of Dominion such an Obligation is consequent to the Mind: Because there being many kinds of Dominion, it may be such a Dominion as has only

VI. Whether Prisoners may make their Escape.

K 3

Power

(f) And *Tacitus* in his second History.] And third *de Cremona captis*. The Consent of all Italy prevented any Booty to the Soldiers.

(g) If they escape to their own Garrisons during the War. they recover their Liberty by the Rights of Postliminy.] See hereafter. Cap. 9. § 5. *Pliny's Nat. Hist.* 7. 23. *de M. Sergio*, being twice taken Prisoner by *Hannibal*, he twice escaped out of his Chains.

Power in Human Judgment and by Compulsion, which is often found in other kinds of Right.

2. For such in some sort is also that Law that makes void some Wills, or Testaments, for want of some particular forms which the Civil Law requires. For the more probable Opinion is, that what is bestowed by such a Will, may be retained with a safe Conscience, at least, whilst it is not contradicted. Not much different is his Right, who according to the Civil Laws has unfaithfully prescribed, for the Civil Laws allow his Title of Dominion. And by this Distinction is solyed that difficult Point of *Aristotle's* concerning Pretences, 2d Book, 5th Chap. ἀρεσθ' ἑκάστου τὰ αὐτοῦ ἔχει ἕκαστος, &c. *Is it not just that everyone should enjoy his own? but whatsoever the Judge has decreed to the best of his Knowledge (tho' it should be false) stands good in Law, so that the same may be both just and unjust.*

3. But in our Question there can be no reason supposed, why the Nations should regard any other Right than the External. For the Right of claiming a Prisoner, or forcing him, nay, of binding him too, and of taking what he has, is a Motive strong enough to induce the Captor to save the Life of his Captive; or if he were so barbarous as not to be moved by this Consideration, then certainly he would not be prevailed upon by any Bond of Conscience, but if he think it at all necessary, (b) he may demand his Promise, or his Oath.

4. Yet we must not rashly admit that Interpretation, which makes an Act sinful, which is otherwise lawful, in a Law not arising from Natural

(b) He may demand his Promise, or his Oath] Bembo Hist. B. 10. says, his Conscience cannot charge him with Theft, if he takes nothing but what had been his own.

tural Equity, but made purposely to avoid a greater Mischief. *It signifies not much* (says Florentius the Lawyer) *how a Prisoner escapes, whether freely dismissed, or by Force or Cunning has got out of the Power of his Enemy.* Because this Right of Captivity is so a Right, that in another Sense it is for the most part even an Injury; wherefore Paulus the Lawyer calls it a Right as to some Effects, but an Injury in respect to the Intrinsick Nature of the thing. Whence it is also plain, if any Man taken in an unjust War fall into the Power of his Enemy, he cannot in his Conscience be thought guilty of Theft, if he carries off with him what was his own; or tho' not his own, (i) if it were due to him as a Reward for his Labour, if he has reserved any besides his Sustenance; provided that he himself owes nothing to his Lord, upon his own, or any Publick Account, or to him from whom the Lord derives his Right. Neither does it avail to say, that such a flight, and carrying off Goods, when caught, uses to be severely punish'd: For great Men often do such things, and those far

K 4

more

(i) *If it were due to him, as a reward for his Labour.*] Hither may be referred what I have already quoted out of Irenaeus and Tertullian, on B. 2. Cap. 7. § 2. where they speak of the Israelites departure out of Egypt; as also that of Philo in the Life of Moses, *But they, when they were thrust out, and driven away from Egypt, remembering their Family, they undertake a thing worthy of Freemen, not unmindful of what they had suffered through Injury and wicked Craft; for they carried away many Spoils, partly themselves, partly laid on their Beasts, not out of Covetousness or that any one should slanderingly say out of a desire of another Man's Goods. For how can this be charged on them? First they did it as a just Reward of their long and hard Labour; then as a Fine or Punishment for their severe Oppression, but much less than they might.* There is a like Story of Malchus the holy Man written by St. Jerom in his Epistles, and of Leupgis the Lombard, which his Grand Nephew Paulus Warnafred has. B. 4. you may also add the Confession Published under the Name of Lanicus Patricius.

more unjust, not because they are equitable, but for their Conveniency.

5. (k) But whereas some Canons prohibit the perswading a Slave to quit his Master's Service; if that Prohibition relate to those Slaves who are justly punished with Bondage, or have by a voluntary Contract made themselves so, it is then just, but if to them, who are taken in an unjust War, or born of such, it shews only that Christians should advise Christians to Patience and Forbearance, rather than to those Acts, which tho' strictly lawful, may give Offence either to Infidels or weak Brothers. In like manner we are to understand the Advice of the Apostles given to Servants, unless that Advice may seem rather to perswade Servants to an exact Obedience during their Service, which is agreeable to Natural Equity, for their Labour and their Maintenance mutually answer one another.

VII. Whether they may resist their Lords.

VII. But as the same Divines hold, that a Prisoner cannot resist his Lord in executing that External Power which he has over him without Injustice, I entirely agree with them; but there is this manifest Difference between that External Right, and those things I said before. That External Right, which consists not only in a bare Licence of doing to a Slave what the Lord pleases, but also in the Protection of the Laws, would be wholly vain, if on the other side it were lawful to resist. For if it be allowable for a Slave to resist his Lord, he may as well resist the Magistrate that defends his Lord: Since it is from the Law of Nations that that Magistrate ought to defend the Lord in that Dominion, and in the Exercise of it. This Right there-

(k) But whereas some Canons.] Out of the Gang. Syn. See B. at the end of the 5th Chapter.

therefore is like that which we have elsewhere allowed to the Chief Magistrate in every City, that it is unlawful and impious by Force to resist them. Therefore St. *Augustine* joins them both together, when he says, *Subjects should so bear with their Sovereigns, and Slaves with their Lords, that in exercising their Patience they may preserve their Temporal Estates, and hope for Eternal.*

VIII. But this also we must observe, that this Law of Nations concerning Prisoners, has not been at all Times, nor among all Nations received, tho' the *Roman* Lawyers call it General, perhaps taking the Custom of the Countries most known to them, for the Universal Custom of all Nations. So among the *Hebrews* (1), who joined neither in Customs nor Affinity with the other Nations, there was a place of Refuge for Servants, that is, for those (as the Interpreters well observe) who became so by their Misfortune, not their Crime, on which that Privilege seems grounded among the *Franks*, given to Slaves to proclaim themselves at Liberty, which is also now allowed, not only to those taken in War, but to all others whatever.

VIII. That this Right is not allowed in all Nations.

IX. 1. (m) But even among Christians it is generally agreed, that being engaged in War, they that are taken Prisoners, are not made Slaves, so as to sell them, or force them to hard Labours, or to such Miseries as are common to Slaves, and that with reason; for they are, or should be better instructed by the great Recommender of Christian Charity, than not to be diverted from the killing of unhappy Persons, unless they may be allowed the

IX. Nor now amongst Christians, and what is introduced in its stead.

Exer-

(1) Among the Hebrews.] See *Præcep. Vetant* 180.

(m) But even among Christians.] And *Essenes* likewise, from whom the first Christians were derived. See *Joseph*.

Exercise of a somewhat less Cruelty. (n) And *Gregoras* declares it is a continued Custom among those of the same Religion, nor was it peculiar to them who lived under the *Roman* Government, but was common to the *Thessalians*, *Illyrians*, *Triballians* and *Bulgarians*. And this at least (tho' but a small matter) has Christian Religion compleated, which *Socrates* in vain attempted to have introduced among the *Grecians*.

2. And what *Christians* in this Case observe among themselves, (o) the *Mahometans* likewise do among themselves. Yet even among Christians this Custom still continues, that those taken in War are kept safe till their Ransom be paid, which is set at the Pleasure of the Conqueror, unless it be otherwise agreed upon; but this Right of keeping Prisoners is usually granted to the Captors, except they be Persons of Quality, for these are kept at the Charge of the State, or Chief Magistrate, according to the Custom of most Nations.

(n) And *Gregoras*.] B. 4. where are these Words, *It is the Law delivered without Corruption from the Ancients to Posterity; that it was lawful not only for the Græco-Romans and Thessalians, but for the Illyrians, Triballians and Bulgarians, because they were of the same Faith, to seize upon the Goods indeed as Spoil, but not to take the Men Prisoners of War, nor kill them, when the Battel was over.* *Adam Bremen* of *St. Ansgarius*, returning from thence to *Hamburg*, he rebuked the *Nordalbianians* for selling the *Christians*. This Custom *Boer* speaks of *Decis* 178. and adds, it is observ'd in *France*, *England* and *Spain*, that if a *Duke*, *Count* or *Baron* was taken, he does not belong to the Soldiers, but to the Prince who is Victor.

(o) The *Mahometans* likewise do among themselves.] *Chaloccond.* B. 3. *Leunclav.* B. 3. and B. 17. *Busb. Exor. Epif.* 3.

C H A P. VIII.

Of Empire over the Conquered.

I. I. NO wonder that he who can bring into Subjection every particular Person, can subdue the whole Body, whether it be a State, or part of a State; whether that Subjection be meerly Civil, meerly Tyrannical, or mixt. *Seneca* makes use of this Argument in the Controversie de Olyntheo, *he is my Slave whom I bought by the Right of War, and it is very convenient for you, O Athenians, otherwise your Dominion must be confined within its former Bounds, notwithstanding what you have gained by War.* Wherefore *Tertullian* owns, that Empires are gained by Arms, and enlarged by Conquests. So *Quintilian*, Kingdoms, Nations, the Bounds of Cities and Countries are determined by the Right of War. *Alexander* in *Curtius* says, that Laws are imposed by the Conqueror, and received by the Conquered. And *Minia* in his Oration to the Romans, *Why do you send every Year your Prætor with the Ensigns of Empire, the Rods and Axes, unto Syracuse, and other Greek Cities in Sicily? Truly you can say nothing else, but that having subdued them by Arms, you impose these Laws upon them.* And *Ariovistus* in *Cæsar's Commentaries* says, *that by the Law of Arms the Conqueror may govern the Conquered as he pleases.* And again, *The Romans govern those whom they have Conquered, not after the Prescriptions of others, but according to their own Pleasure.*

2. *Justin* tells us out of *Trogus*, that Princes that made War before *Ninus*, sought not Empire, but Glory, and being contented with the Victory, did not strive for Dominion. That *Ninus* was the first who enlarged the Bounds of his Empire, and subdued other

I. That a Civil Empire, whether in a King, or People, may be acquired by War, and the effects of such Acquisition.

other Countries by War, and from him it became a Custom. *Bocchus* argues in *Salust*, that he took up Arms to defend his Kingdom, for that part of *Nu-midia*, from whence he had beaten *Jugurtha*, was become his own by the Right of War.

3. But an Empire may be acquired by Conquest, either so far as it was (*a*) in the King, or another Governor, and then he succeeds only in his Right, and no more. Or (*b*) as it is in the People, and the Conqueror has the same Power to alienate it as the People had, and thus Kingdoms become Hereditary (or Patrimonial) as I have said elsewhere.

II. An Empire may be acquired over the People that is Despotical, and then they cease to be a State.

II. 1. And yet an Empire may be more Absolutely acquired, as that which before was a City may

(*a*) *As it was in the King.*] *Alexander* after the Battle of *Arbela* was saluted King of *Asia*. The Romans alledged that what had been *Syphax's* was now become theirs by the Right of War. *Appian* *Extra. Legat.* 10. N. 28. The *Embassadors* of the *Goths* in *Agnathius* I de *Theuderic*, when he had overcome *Odoacer* the *Syrian* *Stranger*, he possess whatever had been his by the Right of War; but the *Huns* arguing that the *Gepids* were theirs, because they had their King, the *Romans* denied it, because the *Gepids* had rather a Prince than King, neither were they his Inheritance. *Menander* *Protest.* mentions it.

(*b*) *As it is in the People.*] Thus the *Persians*, in the same *Menander*, pleaded for the Territories of the City *Daras*; since the Town it self has been subdued to them by the Right of War, it was but reasonable that what belonged to the City should likewise be theirs. So *Belisarius* having overcome the *Vandals*, would have had *Lilybaeum* in *Sicily* been yielded to the *Romans*, as what the *Goths* had given to the *Vandals*, but they denied that they had given it, *Procop.* *Vandal.* 2. *Henry* the Son of *Frederick* *Barbarossa* having taken *Sicily*, claimed also *Epidaurum*, *Thessalonica*, and other places possess by the *Sicilians*, for himself. *Nicetas*, B. 1. of *Alexius* Brother to *Isaacus*. *Bajanus* head of the *Avari* to the *Emperor* concerning *Sirmium* that that City belonged to him, as having been under the *Gepids*, which *Gepids* had been conquered by the *Avari*. And *Peter*, *Fusianus's* *Embassador*, in his Speech to *Chosro's*, for he that is Lord of the Principal, how shall he not be also of the Accessory? For neither the *Lazi*, or *Suani*, did ever urge this Plea, that *Suania* did not of old belong to the *Lazi*. Both of them are out of *Menander* *Protest.* add what are in this Chapter, § 4.

may cease to be a City; which may be done, either by adding it to another City, as the Roman Provinces were, or by not joining it to another City neither, (*but by destroying its Charter*) just as when a King making War at his own Charge so enslaves the People, as to govern them not for their Profit, but his own private Interest, which is a kind of Arbitrary, not Civil Government. Aristotle in his seventh Book of a Republick says, *ἡ δὲ ἀρχὴ, &c. There is a Government for the Benefit of the Sovereign, and another for the Advantage of the Subject, the one is Monarchy, the other Tyranny.* The People then under this Government, for the future, are no Citizens, but a Multitude of Servants; for it was well said of *Antaxandrida*,

Οὐκ ἐστὶ δούλων, ὠνάδ', εὐδαμὲς πόλις.

My Friend, a City is not made up of Slaves.

2. And Tacitus thus opposes these to one another, *He did not consider it as Tyranny over Slaves, but as Government over Citizens.* And Xenophon of Agesilaus, *ὅποσας ὅ πόλις πρὸς αὐτὸν, &c. Whatever Cities he subdued, he made them free, delivering them from the Slavery which Captives suffer under their Lord, and required no more Obedience than what a free People pay their Prince.*

III. And hence we may understand, what a mixt Monarchy is between the Despotick and the Civil, namely, when our Service is mixt with a kind of Personal Liberty. Thus we read some People have their Arms taken away, and that they should use no other Instruments of Iron, but what were necessary for Husbandry: Others forced to change their Language and method of Living.

IV. 1. But as the Goods of every particular Prisoner, by the Right of War, belongs to the

III. Sometimes a mixt Government is acquired.

IV. That even the incorporeal things may be acquired by War, where is handled a Question concerning the Thessalian Bond.

Captors, so the Goods of the People in general belong to the Conquerors, if they please. For what *Livy* said of those that surrendered themselves, (c) *All things are given up to the Conqueror, so that it is wholly in his own Power and Will to take what he pleases to himself, and to punish them as he has a mind;* the same may be said of those conquered in a Solemn War. For a Surrender doth but voluntarily yield up, what would otherwise be taken away by force. So the *Scaptian* in *Livy* says, *That the Land in Dispute was on the Borders of Corioli, which being taken by the Right of War, it became then the Romans.* And *Hannibal* in the same Author thus encourages his Soldiers in his Oration before the Battle, *Whatsoever the Romans have by so many Victories got, and heaped up, shall, together with themselves the Masters of it, be ours upon the Victory.* And thus *Antiochus*, by being vanquished, when all that was his, by the Right of War, became *Seleucus's*, he acquired the Rightful Propriety of them. So all that *Mitridates* had taken in War, and added to his own Dominion, *Pompey* (by beating him) made the *Romans*.

2. Wherefore even those Incorporeal Rights, which belonged to the Generality, shall become the Conqueror's, as far as he pleases. So upon the subduing *Alba*, all the Rights of the Citizens were claimed

(c) *All things are given up to the Conqueror.* See above B. 1. Cap. 3. § 8. and B. 2. Cap. 5. § 31. and in this B. Cap. 5. § 1. and afterwards c. 29. § 49. Add also the Extracts of *Polybius Legat.* 142. *They that yield themselves to the Romans, do first give up their Country and the Cities therein, besides all the Men and Women that are in the Country, or the Cities. Also all the Rivers and Ports, and generally all things Sacred and Religious: So that the Romans become Lords of all and those that Surrender themselves have nothing that they can call their own.* See what has been said above, Cap. 7. § 4. *Justin*, B. 4. speaking of the Jews, says, afterwards with the *Persians* they fell into the Power of *Alexander the Great*.

claimed by the *Romans*: Whence it follows, that the *Thessalians* were entirely discharged from the Obligation of an hundred Talents which they owed to the *Thebans*, when *Alexander* the Great having conquered the *Thebans*, had as their Lord by the Right of Conquest forgiven the Debt. Neither is that perfectly true, which *Quintilian* alledges in behalf of the *Thebans*, that what he seizes only belongs to the Conqueror, that the Right which is Incorporeal cannot be taken by ones Hand; that the condition of an Heir is one thing, and that of a Conqueror another; because the Right passes to the one, and the Thing to the other: For he that is Master of the Persons, is also of the Things, and of the Rights belonging to them. He that is possess'd by another, can be in possession of nothing in his own Name, for he is not so much as Master of himself.

3. Yea, tho' the Conqueror leave to the Conquered *Jus Civitatis*, the Right of being a City, yet may he take to himself any thing that belongs to it. For it is in his Power to limit his own Bounty as he pleases. *Cæsar* imitated *Alexander* in forgiving a Debt to the *Dyrrachians*, which they owed to some of the Adversaries. But here it may be objected, that the War of *Cæsar* (d) was not of the same kind, concerning which this Law of Nations was instituted.

(d) Was not of the same kind, concerning which this Law of Nations was instituted.] *Antony* commanded the *Tyrians* to restore what they held belonging to the *Jews*, not granted by the *Senate*, and possess'd before the War of *Cassius*, as *Josephus* relates. See also *Bizar. Genuens. Histor. B. 10.*

C H A P. IX.

Of returning home from Captivity.

I. The Original of the word Postliminium.

I. 1. **A**S the Lawyers of former Ages have writ nothing absolutely of things taken from Enemies, so neither have they of the Right of those that return home. This Subject has been treated of by the old Romans somewhat more accurately, but oftentimes too confusedly; so that the Reader could not well distinguish, what they attributed to the Civil Law, and what to the Law of Nations.

2. The Opinion of *Servius*, of the word *Postliminium*, is to be rejected, who takes the latter part of it to be of no signification; but that of *Scævola* to be approved, who compounds it of (a) *Post*, that may signify a Return, and *Limen*, a Threshold of a House, or Frontier of a Country; for *Limen*, and *Limes*, differ only in Termination and manner of Declining, for they are both derived from the old word (b) *Limo*, that signifies opposite or across, and in the Primitive Notion are the same; as *Materia* and *Materies*, *Pavus* and *Pavo*, (c) *Contagio* and *Contagas*, *Cucumis* and *Cucumer*;

(a) *Post*, that signifies a Return] Whence *Postvortia* Dea.

(b) From the old word *Limo*.] *Servius* upon the 12th *Aeneid*, and *Dionatus* upon that of *Eumuchus*, *limis oculis*, looking away; and *Festus*, *Limis obliquus*, (i. e.) overthwart, across; whence also *Limina* the Entrance. And *Isidore*, B 15. c. 14. *Limites*, well called by an old word *Transversi*; for the Ancients called all overthwart things *Lima*, whence *Limina*, the Thresholds of the Doors by which we go out and in, and *Limites* Bounds, because by them we go abroad into the Fields, in the Glossary, *πλαγία ὁδός*, a crooked, or bending way.

(c) *Contagio*, and *Contagas*] *Compago* and *Compages* a joint, which was formerly *Compagen*, and the Genitive Case shews, and the Verb derived

sumer; tho' of late *Limen* has been more applied to private, *Limnes* to publick Things. So the Ancients called banishing of a Person *Eliminare*, and Banishment they termed (d) *Eliminium*, thrusting out of their Bounds, or Limits.

II. 1. Therefore *Postliminy* (or Return from Captivity) is a Right which ariseth from a (e) Man's return to his own Home, or the Frontiers of his Country. So *Pomponius* calls him returned from Captivity, who was just got within our own Garrisons. *Paulus*, when he was entered our Bounds, or Territories. But by a Parity of Reason, the general Consent of Nations has allowed, that this *Postliminium* (or Right of Return) should take place, even as soon as the Person returning, (or any thing capable of this Right) should come safe to our Friends, as *Pomponius* has it in the aforesaid place; or as *Paulus* explains it by way of Example, to such a King, Confederate, or Friend; (where (f) Friends, or Confederates, are not to be taken simply for those with whom we are at Peace but those who join with us in the same War) unto whom they who shall arrive, are to be safe, and defended, as *Paulus* speaks, upon the publick Account; for it is all one, if the returned (whether Person, or Thing,) escape to these, or to his own immediate Country-men.

II. Where this Right takes place.

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derived from it, (*Compagino*, to join) as also *sanguis* was formerly *anguen*, Blood.

(d) They termed *Eliminium*, thrusting out of their Bounds] And *Colliminium* in *Solinus*, is what they generally call *Collimitium*, a meeting of the Bounds.

(e) From a Man's return to his own Home] Hence taking the use of the word, *Tertullian* mentions *Postliminium*, the Return of Ecclesiastical Peace, de Pudic.

(f) Friends or Confederates, are not to be taken simply, for those, with whom we are in peace.] So it appears to have been the opinion of the King of Morocco and Fez, from *Ithuanus*, B. 130. in the Year 1603.

2. But among those who are Friends, but not engaged in the same Party, Persons taken in War, change not their condition (of Captivity) unless by a special Article and Agreement, as it was stipulated between the *Romans* and *Carthaginians*, in their second League, That if any of the Friends of the *Romans*, being taken by the *Carthaginians*, should escape into any Ports subject to the *Romans*, they should obtain their Liberty, the like Provision being made for the Friends of the *Carthaginians*. (g) Therefore the *Romans*, who being taken in the second Punick War, and sold by way of Merchandize into Greece, were not admitted to this Right of *Postliminy*, because the *Greeks* were Neuters in that War; there was therefore a Necessity of their being Ransomed, before they could be set at Liberty. We also read in *Homer* of several Persons taken in War, Sold into such Countries as were at Peace, as *Lycaon*, *Iliad* ̄, and *Eunymedura*, *Odyss.* H.

III. That some things return and some are received by this Right of *Postliminy*.

III. The old *Romans* look'd upon those received out of Captivity, as direct Freemen. *Gallus Aelius*, in his first Book of the Significations of Law Terms, saith, That a Man being Free of one City, that voluntarily withdrew to another, and afterwards returned to that City, (whereof he was first Free) was said to be received by the Right of *Postliminy*. Thus a Servant taken Prisoner, and carried Captive to an Enemy's Garrison, if he afterwards returns to us by this Law of *Postliminy*, returns to the Obedience of his old Master. A Horse, a Mule, and a Ship, have the like

(g) The *Romans*, which being taken in the second Punick War, were sold into Greece, had not the Benefit of this Right of *Postliminy*]. *Val. Max.* B. 5. cap. 2. 6. *Diod. Sic. Excerpt. Legat.* N. 3. So the *Rhodians* freely restored to the *Athenians*, what *Athenian* Citizens they had bought in *Phillip's War*, *Polyb. Excerpt. Legat.* N. 3.

like privilege of *Postliminy* (thus I judge those three words with little alteration may be retained, which *Jacobus Cujacius*, a Man incomparable for his Study of the *Roman Law*, would have left out) as a *Servant*: *What kinds of things do return to us by this Right of Postliminy, the same may return from us to our Enemies.* But the Modern *Roman Lawyers* have with more Judgment allowed but two kinds of *Postliminy*, viz. when we either return, or receive something returned.

IV. 1. The Opinion also of *Tryphoninus* is allowable, who says this Right of *Postliminy* is necessary in War, or Peace; in a Sense somewhat different than *Pomponius* expressed it. This Right of *Postliminy* in Peace (unless it be otherwise stipulated) belongs (*h*) to those who were not overcome in War by force of Arms, but were by their own Misfortune surprized, as found in the Enemies Country, when the War suddenly broke out. But there is no Benefit of *Postliminy* to other Prisoners in time of Peace, (*i*) unless it were mutually

IV. This Right of *Postliminy* is of Force in Peace and War, and what if nothing be said in Peace.

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(*h*) To those who were not overcome in War by force of Arms, but were by their own Misfortune surprized.] See an Instance in *Panatus* of *Cyprian War*, B. 1.

(*i*) Unless it were mutually comprised by Article.] See *Josephus Ant. Hist.* 13. 2. *Polybius* tells us, that in the Peace made between *Philip* and *Antiochus*, it was agreed that all Prisoners on either side should be restored, except the *Ætolians*, *Excerpt. Legat.* 9. 28. 5. *Livy* has the like Examples, and particularly of the Peace with *Nabis*. There are some also in *Zosimus*. As the Peace of *Probus* with the *Vandals* and *Burgundians* runs thus, that all the Prey which they had taken, and all the Prisoners, should be restored B. 1. He also relates a like Peace made by *Julian* with the *Germans*, also with the *Quadi*, that were in Germany B. 3. *Ammianus Marcellinus* of *Sumarius*, King of the *Almains*, or *Germans*, begs Peace to the oppressed (or humbled) Nations, and he obtained it with the forgiving of what was pass'd, upon this condition, that they should restore our Prisoners, Again of the *Sarmatians*, being ordered to get dwelling places, they without fear delivered up our Prisoners. He again says the same of another Party of *Sarmatians*. And many such in *Zonaras*, among the rest, in the Affairs of *Michael Son of Theophilus*, speaking of the *Bulgarian*,

tually comprised by Article. And the most learned *Peter Faber* admirably corrects that place of *Tryphoninus*, not disapproved by *Cujacius*, for the subsequent Reason, and the opposite Member do plainly prove this. The Peace was made, and the Prisoners released (saith *Zonaras*) for so it had been agreed upon. So *Pomponius*, If the Prisoner, concerning whom, it was comprehended in the Articles of Peace, that he might return, should chuse of himself to remain with the Enemy, he shall not afterwards challenge this Right of Preliminy. And *Paulus*, If a Prisoner taken in War, upon the making of Peace shall flee home, he shall by this Postliminy be returned back to him, who in the former War had taken him, unless it be expressed in the Articles of Peace, that the Prisoners should be released.

2. *Tryphoninus* alledges this Reason out of *Servius*, that the Romans thus behaved themselves to their Prisoners, because they would have them place all their hopes of returning in their own Valour rather than in Peace. For thus saith *Livy*, *Rome was a City, of old not favourable to their Prisoners*. But this Reason being proper only to the Romans, could not constitute the Law of Nations; it might yet be one Reason, why they themselves did admit that Law introduced by other Nations. But this is a truer Reason, because Kings, and States, who enter into War, desire to have it believed, that their Cause was just in doing it, and theirs unjust who engaged against them. Which whilst both Parties desire to have equally believed, it would not be safe, for any that would

Bulgarian, says, He promised to set the Prisoners at Liberty. *Nicetas*, B. 2. says, that Liberty was given to all the Prisoners, except to the *Corinthian* and *Theban* Men and Women. Sometimes it is agreed, that the Prisoners should be restored that were possessed by the State, as it is in *Thucydides* 5.

live in peace, to engage in the Controversie. Therefore the Nations that are at Peace can do nothing better, than quietly (*k*) to take that to be just, that was done in that War, and so the Prisoners mutually taken in Arms, should be esteemed lawful Captives.

3. But the same cannot be alledged against those who have been unhappily surprized by the sudden breaking out of a War, for no Advice or Attempt can be laid to their Charge: Yet it has not been thought unjust to detain them during the War, in order to weaken the Enemies Power; but upon the end of the War, nothing can be offer'd why they should not be discharg'd. Therefore it is universally allowed, that such Prisoners, upon the Conclusion of a Peace, should be released, as being accounted innocent by both Parties. But as to other Captives, every one that has usurped a Right over them, is desirous to have them thought his just Purchase, unless the Articles of Agreement have otherwise provided. Therefore for the same Reason, (*l*) neither Servants, nor things taken in War, are restored in Peace, unless expressed in the Articles. Because the Conqueror pretends to have a just Title to them, which to contradict, were to lay a Foundation for a new War; whence it is plain, that that alledged in *Quintilian* for the *Thebans*, is rather witty than real; that Prisoners, if they can make their Escape into their own Country, are to be esteemed free, because

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(*k*) To take that to be just, which was done] See *Priscus Excerpt.* Legat. 28. And *Bezar*, of the War of the *Genoese* against the *Tunisians*, B. 2.

(*l*) Neither Servants.] *Totilas* declared to *Pelagius* the Deacon who was sent to him from the Romans, that he should not mention the restoring the *Sicilian Slaves*, alledging that it was unjust that the Romans should deliver their Fellow Soldiers to their old Masters. The Passage is in *Goth.* 3.

what is gotten by Force, is not to be kept but by the same Force; we have hitherto treated of those that make their Escape after the Conclusion of Peace.

4. (m) In time of War they return by the Right of Postliminy, who were free before they were taken Prisoners, but Servants and other things are said to be received.

V. When a Freeman, during the War, may return by this Right of Postliminy.

V. He that was Free, returns so by this Right (of Postliminy), if he returns with this design, as to follow the Fortunes of his own People to whom he returns, as *Tryphoninus* has it. For that the Servant who is to be made free, ought (as I may so speak it) to be at his own disposal, that thereby his Act may be free and voluntary. But whether (n) he be retaken from the Enemy by force of Arms, or by Craft made his Escape, it is all the same thing, as *Florentinus* observes. And so it is likewise, if he be freely delivered up by the Enemy. But what (o) if he be sold by way of Traffick to another, as it often happens, and thence escape to his own Country? This Controversie is discussed by (p) *Seneca* in the *Olynthian*, whom *Parrhasius* bought: For when a Decree was passed by the *Athenians*, whereby the *Olynthians* were order-

(m) In time of War they return by Postliminy, who were free, before they were taken Prisoners.] *Julian* in his Oration against the evil *Cynicks*: At this rate they should be Slaves, even whom we set at Liberty, being taken in War; but the Laws adjudge Liberty to such, as find as they shall get to us.

(n) But whether he be retaken from the Enemy by force of Arms. As those taken Prisoners by the *Sclavi*, were delivered by the *Huns*, in *Procop. Goth. 3.*

(o) If he be sold by way of Traffick to another, as it often happens and thence escape to his own Country.] As the *Youth Childubius* in the same Book of *Procopius*, He alledged that from the time he returned into his own Country, he should by Law be free for the future and *Leunclavius* observes, that formerly there was no Postliminy among the *Türks* for Prisoners.

(p) By *Seneca*] B. 5. Controvers. 34.

ed to be Free; he makes this Query, whether by it was meant, that they might be manumitted, or adjudged to be free; of which the last is the truest.

VI. 1. But one that is Free, after he is returned to his own Country, does not only of himself recover his own Freedom, but all things else, that he had in any Nation at Peace, whether Corporeal, or Incorporeal; because People that are at Peace, as they take it for granted, that he is a lawful Captive, so they do, that he is justly released, that they may act indifferently to both Parties; wherefore he that by Right of Arms is possessed of the Body of a Prisoner, has not absolute and undoubted Right to all things that belong to him, for it may cease against his Will, viz. if the Captive should make his Escape into his own Country; for so he loses his Right to those Goods of his, as he does to his Person.

VI. What Right he may receive, and what not.

2. What if he had alienated those Goods, shall he who derives his Title from him that was Owner of the Prisoner by Right of War, be secured by the Right of Nations, or else shall those things (alienated) be recovered? I mean those that are in a Neutral Country. And here there seems to be a difference between those things that may return by Postliminy, and those not capable of that Right; which distinction we shall so explain, that the former may seem to be alienated in their own Nature, and conditionally, but the other, simply and absolutely. Things alienated I look upon to be even those that are given, or discharged, or acquitted.

VII. But as he that returns by Postliminy, recovers his Right to all things that he was possessed of before, so are the Laws in as full force against him and for him, as if he had never been in the Enemies Power, as Tryphoninus says.

VII. All Rights against him are restored

VIII. *Why they that yield themselves are not capable of the Right of Postliminy.*

VIII. *Paulus* justly makes this Exception to this Rule, as it relates to Free-men, *They have no Benefit of Postliminy, that being conquered by Arms, yield themselves up to their Enemies.* Because all Agreements made with Enemies, by the Law of Nations, are to be punctually observed, as we shall shew hereafter; neither is Postliminy allowed against them. Therefore those Romans in *Gelias*, taken by the *Carthaginians*, did own, that the Right of Postliminy did not belong to them, because they had engaged themselves by Oath to return; whence it is well observed by *Paulus*, that during the time of Truce there is no Postliminy allowed. But *Modestinus* says, that if they that surrendered to the Enemy, engaged themselves by no Covenant, or Promise, they may return by the Right of Postliminy.

IX. *How a People may obtain this Right of Postliminy.*

IX. 1. What we have said of particular Persons, the same may be likewise of Nations, that those that were free, may recover their Freedom, if the Assistance of their Friends happen to rescue them from the Power of the Enemy. But if the Body of the People, that constitute the City, be dissolved, I really think that they are not to be esteemed the same People; nor the things formerly belonging to that City, to be restored to them by Right of Postliminy, even by the Law of Nations; because a People, like a Ship, by a dissolution of the Parts, is entirely lost, because its whole Nature consists in that perpetual Conjunction. Therefore the City of *Saguntum* was not the same, tho' the same spot of Ground (on which it had stood) was restored to the ancient Inhabitants eight Years after. Nor *Thebes* the same, after the *Thebans* had been sold by *Alexander* for Bond-slaves. Hence it is plain, that what the *Thessalians* were indebted in to the *Thebans* before, was not restored to the *Thebans* by the Right of Post-

Postliminy, and that for these Reasons. First, because they were a new People; then, because *Alexander*, whilst he had the Lordship over them, had a Power to alienate that Right, and did really alienate it; and likewise, because a Debt is not to be reckoned among things capable of the Right of Postliminy.

2. What we have said of a City, is not very different from that of the old *Roman* Law, by which Marriages were dissolv'd; Marriage was not reputed to be restored by (q) Postliminy, but to be renew'd by joint consent of both Parties.

X. 1. By what we have said, one may easily judge what manner of Right, by the Law of Nations, Postliminy gives to Freemen. But by the Civil Law this very Right, which respects those things that are done in a City, is both restrained by adding some Exceptions, or Conditions, and may be enlarged to other Profits and Advantages. Thus by the *Roman* Civil Law, Fugitives are excepted out of the number of those intitled to this Right of Return, even the Sons of Families, over whom the Parent seems to have retained that Paternal Power, which was peculiar to the *Romans*. And that upon this account, (says *Paulus*) because their Military Discipline was dearer to the *Roman* Parents, than the fondness of their Children. Agreeably to which, says *Cicero* of *Manlius*, that he strictly maintained the *Roman* Discipline, to his own Personal

X. What Rights have they of the Civil Law, who return by Postliminy.

(q) Marriage was not reputed to be restored by Postliminy.] It is otherwise amongst Christians, as *Pope Leo* writes to *Nicetas*, Bishop of *Aquileia* That as in Slaves, or Fields, or even in Houses, or Possessions, the Right is preserved for those that are taken Prisoners, when they return out of Captivity; so also Marriages, if they have been married to others, let them be reformed. See *Hincmar* in his Treaty concerning the Divorce of *Lotharius*, and *Terberga* to the thirteenth Interrogatory, and the Answer of *Pope Stephen*, cap. 19. tome 2. of the Councils of *France*.

Personal Sorrow, that he might effectually consult the Safety of his Citizens, in which he esteemed his own entirely included, whereupon he preferred the Sovereign Right of Majesty to the Motions of Nature, and the Affection of a Father.

2. This also somewhat lessens the Right of Postliminy, which was first enacted by the *Athenian* Laws, and after by the *Romans*, viz. *That he that was redeemed from the Enemy, (r) should serve his Redeemer 'till he had paid his Ransom.* But this seems to be made in favour of Freedom, lest all hopes of recovering the Mony being lost, many (of the Captives) would be irrecoverably left in the Power of the Enemy. And this very Slavery is much qualified by the *Roman* Laws, and by the last Law of *Justinian* it is limited to five Years Service. Also upon the Death of the Ransomed, the Right of recovering the Mony entirely ceases. Likewise by any Contract of Marriage between the Redeemer and the Redeemed, it is adjudged to be remitted; it is also lost by the Prostitution of a Woman Ransomed. There were also many other things enacted by the *Roman* Law, in favour of those that would Redeem Captives, and for the Punishment of their Kinsmen that would not Redeem them.

3. Again, this Right of Postliminy was much advanced by the Civil Law; in that, not only those Rights in Postliminy, allowed by the Law of Nations, but all Things, and all Rights, are as entirely his, as if the Returner had never been in the Power of the Enemy; this was also the *Athenian* Law: For as we read in *Dion Prusænsis* 15th Oration, A certain Man pretending to be the Son

(r) *Should serve his Redeemer, 'till he had paid his Ransom*] Id. cap. 34. *Edit. Car. Bald. Pifis.*

Son of *Callias*, and taken Prisoner in the Defeat at *Acanthus*, and had been a Slave in *Thrace*; when by the Right of Postliminy he returned to *Athens*, demanded the Inheritance of *Callias* from the present Possessors of it; the only thing debated was, whether he was really the Son of *Callias*, or not. The same Author also relates, that the *Messenians*, after a long time of Slavery, recovered both their Liberty and Country. Yea, and those very things which either by Usurpation, or Redemption, were taken from their Goods, or seemed to be lost for want of use, are all recovered by a Rescissory (or *Repealing*) Action: For in the Edict of entirely restoring the Ancestors, he is likewise included, who is in the Power of the Enemy; and this too derived from the Ancient Roman Law.

4. But further, the *Cornelian* Law makes Provision for the Heirs of those that die in Captivity with the Enemy, and preserves all their Goods, just as if the Person taken Prisoner died at that very time. If it were not then for these Civil Laws, the Captives (*s*) Goods would immediately be theirs that seized on them, because he that is taken by the Enemy, is reputed as not to be at all. But if a Captive did return, he should receive only those things which, by the Law of Nations, challenge the Right of Postliminy. But that the Goods of a Prisoner, if he have no Heir, should be Confiscated, was a Law peculiar to the *Romans*. We have now look'd into the State of Captives to be returned, I will now speak of such Things as are to be received.

XI. 1. A-

(*s*) The Captive's Goods would immediately be theirs that seized on them.] See the Law of the *Visigoths*, B. 5. tit. 4. c. 15.

XI. How
Servants
are received
by Postlimi-
ny, how En-
gatives, and
how those
that are re-
deemed.

XI. 1. Among these are chiefly Slaves of both Sexes, yea (t) even those that have often been Alienated, (u) or have been Discharged by the Enemy. Because (as Tryphoninus well observes) a Release from the Right of an Enemy ought not to prejudice a Citizen of ours, his *quondam* Master. But that a Servant may be capable of this *Reception*, there is an absolute necessity, that he be then in the actual Possession of his old Master, or be so at his Pleasure. Wherefore, as in other things it is sufficient, that they be brought just within our Territories, that will not be enough to entitle a Servant to the Right of Postliminy, unless also notice be given of his being there. For he that is in the City of *Rome* (as it were) *Incognito*, in *Paulus* his Opinion, is not allowed to be yet received. And as a Servant in this case differs from things inanimate, so does he likewise from a Freeman in this, that in order to make him capable of this Right of Postliminy, it is not required that he should return with an Intent to follow the Fortunes of our City. For that is only required of him, that is to recover his own Freedom, not of him that is to be received of another. And as *Sabinus* has it, *Every Man has a free Power to chuse what City he pleases to make himself a Member of, but not of the Right of Dominion.*

2. The

(t) *Even those that have been often alienated.*] But by an Edit of Theodorick, it was thus ordained, *That Servants, or Tenants taken by the Enemy, and returning home, be restored to their own Lords, if they were not bought before by some other of the Enemy, by way of Trade.* See also *Cassiodore* 3. 43. but by the Law of the *Visigoths*, a Slave recovered by War is restored to his Lord, and the Captor receives the third Part of the just value. But if he were sold by the Enemy, his Lord was to pay the full Price for which he was sold, with some Advantage, B. 5. tit. 4. 21.

(u) *Or have been discharg'd by the Enemy*] As by *Mithridates*, who were demanded back into Bondage, *Appian Mithridat.*

2. The *Roman* Law did not except Fugitive Servants from this Law of Nations; for even in these the Master may recover his old Right, as *Paulus* observes; lest allowing the contrary, it may be prejudicial not to him, who is still to continue a Servant, but to the Master himself. It is a common Saying of Generals, concerning Servants being recover'd by the Valour of the Soldiers, which some by mistake apply to all things, *We are to look on them as recovered, not as taken, and our Soldiers ought to defend them, not domineer over them.*

3. Those Slaves who are ransomed from the Enemy, by the *Roman* Law become his that redeemed them; but upon laying down their Ransom, they are understood received by the Right of Postliminy. But it belongs to the Civilians to give it a more nice Explication. But some things have been alter'd by the Modern Laws: As to invite Captive Slaves to return, they propose present Liberty to the disabled, (in the Service) and to the rest after five Years; as you may see in the Military Laws collected by *Rufus*.

XII. That Question more nearly relates to us, whether a People subjected to a Foreign Prince, return to their ancient State, which may be disputed, if not he whose Dominion it was, but some of their Allies had rescued them from the Enemy; the same I think may be answered, as (before) of Servants, unless it be otherwise agreed by an Associated League.

XII. Whether a subdued People may be received by Postliminy.

XIII. 1. Among things recoverable by Postliminy, the first to be considered are Lands; It is true (saith *Pomponius*) the Enemy being beaten out of the Lands which they had seized on, the Right of them returns to their former Owners. But the Enemy must be understood then to be driven out, from the time wherein it is plainly evident that they

XIII. That Lands are received by Postliminy.

they cannot return. Thus the *Lacedemonians* restored the Island *Ægina*, recovered from the *Athenians* (x) to the ancient Lords. So *Justinian* and other Emperors, restored the Lands recovered from the *Goths* and *Vandals*, to the Heirs of the ancient Possessors, (y) not admitting those Prescriptions against them, which the *Roman* Laws had introduced.

2. What Right they have to the Lands themselves, I judge them to have the same to all annex'd to those Lands. For even Places taken by the Enemy, which have been (before) esteemed Sacred and Religious, when freed from that Misfortune, return as it were by a kind of Postliminy to their former State, as *Pomponius* observes. Whereto agrees that of *Cicero*, in his Oration against *Verres*, concerning *Diana* of *Segesta*, She recovered her Worship and Habitation by the Valour of *Publius Africanus*. And *Marcianus* compares that Law to the Right of Postliminy, by which, a piece of Ground being built upon, when the Building is fallen, returns to the Waste; wherefore it is allowed, that the Profits of the Land received

(x) To the Ancient Lords.] Who were of the *Lacedemonian* Party, compare with above cap 6. § 7.

(y) Not admitting those Prescriptions against the Lords.] And that by a Law of *Honorius*, who though Spain were left by the *Vandals*, yet whilst the *Vandals* possessed it, he would not allow that a Prescription of thirty Years should Prejudice the ancient Lords, as in *Procop. Vandal.* 1. *Valentinian* in a new Law of *Episcopal Judgment*. We have commanded that those Things be brought to a final Determination within the Space of thirty Years, that have been depending time out of Mind; except those of the *Africans*, which have approved themselves to have suffered a Constraint by the *Vandals*; that this prefixed time of thirty Years be exempted from their Causes, which has appeared to be wasted by Hostility. We find it also in the Council of *Sevil*, in *Caus.* 16. quest. 4. As by the (*Mundial*) Law the ancient Possession is restored to them whom a barbarous Cruelty has confined to the Necessity of Captivity; it was agreed, c. ex transmitt. de Prescript. See also *Cujacius* on the Title, C. de Prescript 30 Annor.

ceived, are to be restored; like to what *Pomponius* delivers of Lands that had been drowned. So it is provided by the Laws of *Spain*, that the Honour, and all Hereditary Jurisdictions belonging thereunto, shall return by *Postliminy*; the greater absolutely, the less if within the space of four Years they be claimed after their Reception, unless it be a Castle (or Fort) lost and recovered again by War, the King then hath Right to keep the Possession of it.

XIV. 1. Concerning Moveables, the General Rule is directly contrary, that they cannot be returned by *Postliminy*, but are by way of Prize, as *Labeo* is of the Opinion; wherefore being free to be bought and sold, wheresoever they are found, they are allowed to be his who bought them; neither has the first Owner any power to claim them, either in a neutral People, or in his own Country. But from this Rule we find of old excepted, Things that were useful in War; which seems to have been generally allowed by all Nations, for this Reason, that the hope of recovering them might render Men more Adventurous to regain them: For the Laws of most Cities at that time, had respect to Warlike Affairs, and therefore they easily agreed in this. We have already mentioned, out of *Gallus Aelius*, what things were esteemed useful in War; but they are more exactly set down both by *Cicero* in his *Topicks*, and in *Modestinus*, viz. Long Ships, and Ships of Burden, but not Yachts and Pleasure-Boats; Mules, but only those used to the Pack-saddle; Horses, and Mares, but only those that will endure the Pit. And these are the things which the *Romans* justly would have bequeathed by Will, and left conditionally, as inheritable to a Family.

XIV. What difference was formerly observed between Moveables.

2. Arms also, and Cloaths are useful in War, but these return'd not by Postliminy, because they were adjudged unworthy of Favour, who lost their Arms or Cloaths in Battel; nay it was accounted a punishable Crime, as may be every where found in Historians. And in this, Arms are observed to differ from Horses, because the Horse may possibly break loose without the fault of the Rider. And this difference of Moveables seems to have been used in the West, even under the *Goths*, to the time of *Boetius*. For he expounding the Topics of *Cicero*, seems to speak of this Right, as if it were in full force to that Day.

XV. *What the Law now says of Moveables.*

XV. But in these later Times, if not before, this Difference seems to have been taken away. For those skill'd in the Customs of Nations do commonly declare, that Moveables do not return by Postliminy, (z) and we see the same in many Places determined in relation to Ships.

XVI. *What things are received, that want not this Right of Postliminy.*

XVI. But those things (tho' taken by the Enemy) which were not brought within their Garrisons, have no Occasion for Postliminy, because they have not yet changed their Owner by the Right of Nations. Also what Pirates and Robbers have taken from us, have no need of Postliminy, (as *Ulpianus* and *Javolenus* relate) because the Law of Nations has not allowed them the Privilege of changing the Right of the Owner; on which account the *Athenians* desired to receive the Island *Halonefus*, which Pyrates had taken from them, and (a) *Philip* from the Pyrates, as restored, not given by *Philip*. Therefore things taken from them, wheresoever they are found, may

(z) *And we see the same in many Places determined in Relation to Ships.* Decis: Genuens. 101.

(a) *And Philip had taken from the Pyrates*] See the very Letter of *Philip* among the Works of *Demosthenes*.

may be claimed; but, as we have concluded in another Place, so much must be restored to the Person, who got Possession upon his own Charge, as the right Owner would willingly have expended for the Recovery of them.

XVII. But it may be otherwise determined by the Civil Law. As (b) by the Laws of Spain, Ships taken from Pyrates, become theirs that take them from the Pyrates. For it is not Unjust, that a private Thing should yield to a publick Advantage, especially when the Recovery may prove so difficult. But this Law cannot hinder Foreigners from Challenging their own.

XVII.
That the
Civil Law
changes
some things,
as to their
own Sub-
jects.

XVIII. 1. That is more admirable, which the Roman Laws do testifie, viz. That this Right of Postliminy took Place, not only between Enemies, but even between Romans and Foreigners. But this (as I said before) was the Reliques of that barbarous Age of the Vagabonds, wherein their Debauched Manners had quite taken away the Sense of that natural Society peculiar to Mankind. Therefore among Nations which were not actually engaged in a publick War with one another, there was a certain Licence of War managed between private Men, seemingly occasioned by their Difference of Manners; which Licence, lest it should proceed so far as to the killing one another, they agreed to settle Laws of Captivity, which consequently introduced that of Postliminy, yet otherwise than with Robbers and Pyrates, because that Force brought the Matter to just Stipulations, which Men of those Professions usually despise.

XVIII.
How Postli-
miny was
observed a-
mong those
that were
not En-
mies.

2. It seems of old to have been very much disputed, whether any of a Confederate Nation, be-

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(b) By the Law of Spain, Ships taken from Pyrates, become theirs, who take them from the Pyrates.] The same is among the Venetians, as appears from the Letters of Fraxinius Canaus. Tom. 1.

ing our Slaves, should escape home, might be esteemed to return by Postliminy. For so Cicero propounds this Question in his first Book *de Oratore*. And Gallus Aelius thus gives us his Opinion. *We observe the same Right of Postliminy, with a Free People, with Allies, and with Kings, as with Enemies. On the contrary Proculus, I doubt not, but that Allies, and a Free People are as Strangers to us, there is no Postliminy between us and them.*

3. Therefore we must distinguish between Leagues, That if any were made with design to put an End to, or to prevent open War, they should not for the time to come prevent the taking of Prisoners, or the Right of Postliminy. But if any expressed, that they might on both sides Travel in Safety, from one to another, upon the publick Faith, then there should be allowed no taking of Prisoners, and consequently no Postliminy. And Pomponius seems to hint as much when he says, *If there be a Nation, with whom we have neither Friendship nor Hospitality, nor League on the Account of Friendship, they indeed are not Enemies. But whatever of ours happens to come to them, is theirs. And a Freeman of ours taken by them, becomes their Slave; and so from them to us; therefore in this Case also Postliminy is allowed.* When he said League on the account of Friendship, he plainly shews that other Leagues may be, in which may be neither Right of Friendship nor Hospitality. And Proculus fully declares, that he takes those to be People confederated, who have engaged in Friendship, and safe Hospitality, when he adds *For what need is there of any Postliminy between us. When they also may retain even their own Liberty, and Property of their own Things with us, as freely as among themselves, and so we among them.* Therefore that which follows in Gallus Aelius, *There is no Postliminy with those Nations, that are under our Govern*

Government, as *Cujacius* rightly reads it, must be supply'd with this Addition, *nor with those, with whom we are in League on Account of Friendship.*

XIX. 1. But in our Days, not only among Christians, but even *Mahometans*, as this Right of Captivity out of time of War, so also that of Postliminy is *superseded*, the necessity of both ceasing by Virtue of that Affinity being recognized, which Nature intended between all Mankind.

XIX. *When this Right may now be in force.*

2. Yet that ancient Right of Nations may still be in Force, if we should have to do with a State so barbarous, as to think it lawful without any manner of Reason, or Denunciation of War, to treat in a hostile Manner the Persons and Goods of all Strangers. And even while I am writing this, it is adjudged in the highest Court of *Paris* *Nicolaus Verdunius* being President of the Assembly that the Goods of the Subjects of *France*, taken by the *Algerines*, a Nest of Pyrates that live upon the Spoil of all Seafaring People, by the Right of War had changed their Owner, and therefore when recovered by others, became theirs that recovered them. In the same Court was this likewise adjudged, (which I said but now) that Ships are not in these Days reckoned among things recoverable by Postliminy.

CHAP. X.

Advice concerning things done in an unjust War.

1. I Must now reflect, and take away from those that make War almost all the Rights, which I may seem to have granted them; which yet I have not. For when I first undertook to

I. In what Sense Modesty may be said to forbid, what Law permits.

explain this part of the Law of Nations, I then declared, that many things are said to be of Right and Lawful, because they escape Punishment, and partly because Military Councils have given them their Authority; which yet either grow extravagant beyond the Rule of Honesty, whether confined to Right strictly taken, or foisted into the Precept of other Virtues, or may certainly be laid aside more religiously, and more honourably, among good Men.

2. *Seneca* in his *Troas* makes *Pyrrhus* speak thus,

Lex nulla capto parcit, aut pœnam impedit.

No Law from Punishment can Captives save.

Agamemnon replies,

Quod non vetat Lex, hoc vetat fieri Pudor.

What Law forbids not, Modesty restrains.

In which place *Pudor* does not so much respect Men, and their Reputation, as it does Equity and Honesty; so we read in *Justinian's Institutions* Things are said to be committed to a Man's Trust, because they are secured by no Bond of Law, but only the Probity of the Person entrusted. So in *Quintilian* the Father, the Creditor cannot (*Salvo pudore*) in Modesty demand his Debt of the Security, but when he cannot get it from the Prime Debtor. And in this Sense we often see, *Justitia* and *Pudor*, Justice and Equity, joined together.

*Nondum Justitiam facinus Mortale fugarat,
Ultima de superis illa reliquit humum.*

Prôque metu populum sine vi pudor ipse regebat.

(a) *Leu*

*The Crimes of Men were not so mighty grown,
As Justice to expell from Mortal View;
She, last of all the Goddesses, retir'd;
And Modesty, not Force, then rul'd the World.*

Hesiod.

Δίκη δ' ἐν χερσὶ, καὶ Αἰδώς
Οὐκ ἔσαι βλάψαι δ' ὁ κακὸς ἢ ἀρείονα φῶτα.

*When Modesty and Justice left the Stage,
All fell a Sacrifice to Vice and Rage.*

Plato to his 12th Book of Laws, παρθένῳ καὶ αἰδέσσι Δίκη λέγεται τε καὶ ὅντως ἄρρηται, or rather παρθεῖον. That the Sense may be, *Justice is called the Companion of Modesty, and that with Reason.* And in another Place the same Plato tells us, θεὸς, &c. God being solicitous for Mankind, lest they should be entirely destroyed, bestowed upon Men Modesty, and Justice, the Ornaments of Cities, and the Bonds of Friendship. Plutarch in like manner calls Δίκην Justice, ἐνοίκον αἰδέσσεως, the Cohabitant of Modesty; and in another place he joins αἰδῶ, καὶ Δικαιοσύνην, Modesty, and Justice, together. In Dionysius Halycarnassensis are named together, αἰδῶς, κόσμος, καὶ Δίκη, Modesty, Decency and Justice. So Josephus couples together, αἰδῶ and ἐπιείκειαν, Modesty and Equity. Paulus the Lawyer unites Natural Right and Modesty. But Cicero thus distinguishes between Justice and Modesty. Justice (says he) teaches not to hurt our Neighbour, Modesty not to offend him.

3. With the Verse before quoted of Seneca, agrees that Expression of the same Author in his Philosophical Writings. (a) *How narrow is that*

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Inno-

(a) *How narrow is that Innocency, which is according to the bare Letter of the Law?* The same Seneca de Benef. 5. 21. There are many

Innocency, which is according to the bear Letter of the Law? How much larger is the Rule of Duties, than of the Law? How many things does Piety, Humanity, Liberality, Justice and Faith require? Which are all beyond the reach of the Law. Where one may see he puts a difference between Jus, and Justitia, Law, and Justice. Where he means by Law, that which is enjoin'd in Courts of Judicature. The some Seneca excellently explains this in another place, by the Example of a Lord's Right over his Slaves. As to our Bondservants we must consider, not what we may without Danger of the Law put upon them, but what the Nature of Equity and Honesty would allow, which obliges us to be merciful to our Prisoners, and those purchased with our own Money. Further, Whereas all things done to a Slave, are allowed by the Law; yet there is something, which the common Right of Animals forbids to be done to him as a Man. In which place we may observe the double Meaning of the word Licere, the one being of an outward, the other of an inward Acceptation.

II. This applied to what is allowed by the Law of Nations.

II. 1. To the same Intent is the Distinction of Marcellus in the Roman Senate, *Not what I have done is here to be debated, since the Right of War justifies whatsoever I have done against the Enemies, but what they ought to suffer, viz. in Reason and Equity. Aristotle disputing the Point, whether Slavery arising from War may be esteemed just, hints at this Distinction. Οὐκ ἔστιν ἀντιχόμηναι τινος, &c.*

Some

many Things not enjoined by Law, nor will bear an Action. to which the mere Custom of Human Life, more prevalent than any Law, does lead us; and Quintil. Institut. Orator. B. 3. c. 8. For there are some things not commendable by Nature, but allowed by Law, as in the 12 Tables, it was lawful to divide the Body of the Debtor among the Creditors, which Law common Custom rejected; and Cicero de Offic. B. 2. The Laws take away Cheating one way, Philosophy another; the Law by bin'ing the Hands, as much as it can, Philosophy as much as possible by Reason and Understanding.

Some respecting only that which is strictly just, (for (b) the Law also something that is Just) maintain that Captivity in War is Just, but they do not say it is absolutely Just, because it may so happen that the War may proceed from an unjust Cause. Agreeable to this is that of *Thucydides* in the Oration of the Thebans, For those ye kill'd with your Hands, it is not so much a Grievance to us, what they suffer'd was by Law.

2. So also the Roman Lawyers themselves, what they often call the Right of Captivity, in another place call an Injury, and oppose it to Natural Equity; and *Seneca* says the Name of a Slave arose from Injustice, having a respect to what often happens to those Persons. The *Italians* also in *Livy*, retaining what they had taken from the *Syracusians* in War, are called obstinate in keeping what they had unjustly gotten. *Dion Pruseensis* having declared, what Prisoners could make their Escape, should be free, adds this, *ὡς ἀδίκως δεκτινός*, As being unjustly enslaved.

3. (c) *Lactantius* speaking of the Philosophers says, when they dispute of Duties relating to Military Affairs, they adapted their Orations neither to Justice, nor true Valour, but the publick Custom of the present Age.

III. We then first declare, if the Cause of the War be unjust, tho' it be undertaken in a Solemn

III. What is done in an unjust War in respect of Internal Justice.

(b) For the Law is also something that is just.] *Seneca* to *Helvidius* c. 6. Some have got themselves a Right by Arms in another's Country. Right and another's seem to clash together, but may be reconciled, as this Context teaches us. Look again on what has been said above in this Book. cap. 4. § 2.

(c) *Lactantius*.] And *St. Austin*, Epistle the 4th to *Marcellinus* says, If this World observe the Precepts of Christianity, even the very Wars would not be waged without Mercy. And again, of the divers Observations of the Church. Among the true Worshippers of God, even the very Wars are peaceable.

lemn manner, yet all the Acts done in it are positively unjust, *in respect to internal Justice*. So that they who knowingly do these Acts, or join in the acting of them, *are to be accounted in the Number of those, who without Repentance cannot enter into the Kingdom of Heaven*. But true Repentance, if Opportunity and Ability will allow, absolutely requires (d) that he who has done any Damage, either by killing, plundering Goods, or violently taking away Cattle, should make full Restitution. Therefore God himself declares their (e) Fasts to be unacceptable to him, who detain'd their Captives unjustly taken. And the King of Nineve, proclaiming a Fast to his Subjects, commands them all to restore what they had taken by Rapine; acknowledging, by the Guide of natural Reason, that all Repentance without such a Restitution would be but pretended, and to no purpose. And not only the (ee) Jews and Christians are of this Opinion, but even the (f) *Mahometans* themselves.

IV. Who are hereby oblig'd to make Restitution, and how far,

IV. But the Authors of War are oblig'd to make this Restitution, according to what we have declared in general elsewhere, whether engaged by their Absolute Power, or Advice of Council, for all those Damages, which are the usual Consequences of War; and for what are unusual, if they either contributed to them by Command or Advice,

(d) *That he who has done any Damage. either by killing, plundering Goods, or violently driving away Cattle, should make full Restitution.* Numb. 5. 6. St. Jerom to Rusticus, Neither is the Sentence of Vengeance differ'd, if every thing be not restored. And St. Austin in his Epistle to Macedonius, B. 54. If another's Goods can be restored for which we have sinned, and are not, our Repentance is not real, but feigned. Gratian in Caus. 11. quest. 6.

(e) *God himself declares their Fasts to be unacceptable to him.* It is a remarkable Place, *Isaiah* 58. v. 5, 6, 7. You have it in Greek in *Justin Martyr*, in *Calloq. cum Tryphone*.

(ee) *Not only the Jews.* See the Penitential Canons of *Moses Maimonides*, cap. 2, § 2. And *Moses de Kotzi*, precept. jub. 16.

(f) *The Mahometans.* See *Leunclavus*. Turc. 5 and 17.

vice, or not prevented them, if it were in their Power to have done it. Thus are Captains also obliged to do, in relation to those things which have been committed by those under their Command; and even the whole Army in gross, that shall act unanimously in any one common Fact, as the firing of a City, &c. and as for particular Actions, every individual Person shall satisfy for that Damage, whereof he was the Cause or joined with others.

V. 1. Neither can I allow that Exception, which some make of those that are only Assistants, if they can be charged with any of the Crime. For the bare Crime is sufficient to engage any War to a Restitution. There are some who seem to think, that things taken in a War, tho' its Cause were really Unjust, are not to be return'd; because both Sides, when they engage in the War, were supposed to have granted them to the Captors. But it cannot be presumed, that any Man will rashly part with his Right, and War in it self is far different from the Nature of Contracts. But that Nations now at Peace might have something secure, nor be forc'd into a War against their Wills, it was judged sufficient to introduce this External Right of Dominion, (which we have mentioned before) which may be agreeable with the Internal Obligation to Restitution. And indeed those very Authors seem to allow as much concerning the Right of taking Prisoners. Wherefore the *Samnites* in *Livy* say, *We have restored the plundered Goods of our Enemies, which by the Law of Arms seemed to be ours; seemed only,* he saith, because that War was Unjust, as the *Samnites* had before acknowledged.

V. Whether things taken in an unjust War, are to be restored by the Captor.

2. Not much unlike this, a certain Power arises from the Law of Nations in a Contract made without Fraud, wherein there is an Inequality, to force the Contracter to perform his Contract;

tract; nevertheless, he that receives more than his due, is obliged in Honesty and Conscience to reduce it to a fair and just Equality.

VI. Whether by him also that detains.

VI. 1. But further, tho' a Man has not done the Damage himself, or if he did it without any fault of his, but yet keeps in his Possession a thing taken away by another in an unjust War, he is obliged to restore it; because there can be no Reason produced naturally just, why the other should be deprived of it. Not unlike to this is that of *Valerius Maximus*. The People of Rome, saith he, when *P. Claudius* publicly sold some *Camerine Prisoners* taken in the War, when he was General, tho' they found their Treasury filled with the Money, and the Borders of their Empire enlarged, yet because it appeared, that the General had not acted with a faithful Sincerity, they with utmost Diligence (g) having sought out the Prisoners, redeemed them, and restored them their Lands. Thus by the Decree of the Romans, even their publick Liberty was restored to the *Phocians*, and also their Lands, which had been taken from them: And afterwards (h) the *Ligurians*, who had been sold by *M. Pompilius*, (their Ransom being paid by the Romans) were restored to their Liberty, and their Goods carefully return'd. The Senate decreed the same in favour of the *Abderites*, adding this Reason for it, because the War made upon them was Unjust.

2. Yet

(g) Having sought out the Prisoners, redeemed them.] *Antony* made the *Tyrians* restore what they had belonging to the *Jews*. He ordered the Men by them sold to be set at Liberty, and to return the Spoil to the right Owners. *Josephus* 14. *Antiq. Hist.* *Macrinus* restored all the Prisoners and Spoil to the *Parthians*, because they had not given occasion to the Romans to break the Peace. *Herodian* B. 4. at the End. And *Mahomet* the Turk set at Liberty all the Prisoners taken at *Santa Maria* in *Achaia*, *Chaleocondylas* B. 9.

(h) The *Ligurians*.] See *Excerpt. Peires. Diod. Sic.*

2. Yet may the present Possessor, whatsoever Charge or Pains he has been at, lawfully deduct as much, as the first Owner would probably have expended to have recovered his endangered Possession, as we have before explained. But if the then Possessor of it, without any direct fault of his, has either wasted or alienated it, he shall not be obliged to refund, further than he shall be thought to have been made Richer by it.

CHAP. XI.

Moderation concerning the Right of killing Men in a Just War.

I. **B**UT that is not to be allowed in a Just War, as is commonly said,

Omnia dat, qui justa negat.

He gives up all, who what is just denies.

But Cicero has it better, *There are some good Offices to be done even to those that have wronged us, (a) for there*

I. That some Acts in a Just War, are not internal-ly Just, explained.

(a) For there is a Moderation required in Revenge and Punishment.] See above, B. 2. Cap. 20. § 2. and 18. and the places of St. Austin of the Christians Mercy in their Wars, which we have lately quoted. Aristotle Polit. 5. Cap. 6. relates that the Punishment taken on Thebes and Heraclea was more cruel than equitable, and done by a Faction. And Thucydides 3. Punishments more than just. Tacitus 3. Annal. Pompey was more severe in his Punishments than the Crimes deserved. And in the same Book he blames Augustus, that in punishing Adulteries he transgressed the Mercy of his Ancestors, and even his own Laws. Juvenal,

— — — — — *exigit autem, &c.*

*And from Revengeful Husbands oft have try'd
Worse Handling, than severest Laws provide.*

Dryden.
Quin-

there is a Moderation required in Revenge and Punishment. The same Author commends the Ancient Times of the Romans, when the End of their Wars were either mild, or immediately necessary. Seneca calls those Cruel, who having a just Cause to punish, have no Moderation in it. Aristides in his first *Leuctrica* saith, ἐστὶ γὰρ, &c. It is possible that they may be unjust, who only revenge a wrong done to themselves, if they go beyond Moderation; for be that in this Act shall exceed just Bounds, occasions a new Injury. Thus in Ovid's Opinion, a certain King by,

————— *cæde nocentum*
Se nimis ulciscens extitit ipse nocens.

Following the Guilty with too quick Revenge
 Deriv'd a Guilt upon himself. —————

The Plateans in an Oration of Isocrates demand ἀδίκαιον ἐστίν, &c. If it be just, thus for such slight Trespases to exact extravagant and terrible Punishments. And the same Aristides in his second Oration for Peace, saith, μὴ τοῖον αὐτὸ ὅταν αὐτὰς τιμωρήσεται, &c. Consider not so much the Crime it self, as the Persons

Quintilian, A Punishment more than Human is not to be required of none, but the worst of Parricides; and M. Antoninus the Emperor, as Vulcatius relates in the Life of Cassius. I will write to the Senate, that the Proscription be not too severe, nor the Punishment too cruel. And Ausonius,

————— *vindictæque major*
Crimine visa suo est —————

The sharp Revenge the Crime did far exceed.

Ammianus, B. 26. They raged against many, more cruelly than their Misdemeanors or Crimes deserved. There is a like place in Agathias, B. 3.

sons to be punished, who we our selves are, and what is the just Measure of Punishment. Minos is commended in Propertius:

Victor erat quamvis æquus in hoste fuit.

The Conqueror (b) to Foes was always just.

And in Ovid,

———— *leges captis justissimus auctor*
Hostibus imposuit —————

Most just to Captives he dispenses Laws.

II. 1. But when it is just to kill (for there we must begin) in a just War according to internal Justice, and when not, may be plainly understood from what I have said in the first Chapter of this Book. For a Man may be killed either designedly, or by Chance. No Man can be justly killed with Design, unless for a Capital Crime, or because we cannot really secure our Lives and Estates without doing it. Tho' that very thing, to kill a Man for mean Considerations, is not repugnant to Justice strictly taken, yet is it far wide from the Law of Charity. But that the Punishment may be just, it is absolutely required, that he who is killed should have offended in so heinous a manner, that before an upright Judge he should be condemned to die. Of which we shall here say the less, because we have

II. Who
may be
killed ac-
cording to
Internal
Justice.

(b) *To Foes was always just.*] Ovid. Trist. 1. Eleg. 8.

Est etiam in miseris pietas, & in hoste probatur.

Compassion's what's the Miserable's due,
And in an Enemy looks well.

have fully done it already in the Chapter concerning Punishments.

III. No
Man can be
justly killed
for his Mis-
fortunes, as
they that
are forced
to follow a
Party.

III. 1. Above, when we treated of Suppliants, (for there are such both in Peace and War) we distinguished between ἀτύχημα, & ἀδίκημα, *Misfortune, and Injustice*. Gylippus in that place of *Diodorus Siculus*, which I but just there quoted, asks this Question, in what Class the *Athenians* ought to be reckoned, either of the Unfortunate, or the Unjust. And he declares, they cannot be ranked among the Unfortunate, because voluntarily without any manner of Provocation, they had made War on the *Syracusans*: Whence he infers, since they had freely begun a War, they must expect to undergo the Miseries of that War. They are to be esteemed Unfortunate who happen to be among the Enemies, but with no Hostile Intent, as the *Athenians* in the time of *Mithridates*, of whom thus speaks *Velleius Paterculus*, *If any one should charge the Athenians with Rebellion, at the time (when Athens was besieged by Sylla) he is very ignorant both of Truth and Ancient History. For the Fidelity of the Athenians was so firm to the Romans, that always, and upon all Occasions, whatsoever was done with a singular Loyalty, the Romans used proverbially to say, it was done Athenian like. But then being miserably oppressed by the Forces of Mithridates, whilst they were within enslaved by their Enemies, and besieged by their Friends, whilst their Hearts were without the Walls, but their Bodies in compliance with Necessity, were within. Which last part seems to be taken out of Livy, in whom Indibilis the Spaniard declares, that his Body only served the Carthaginians, but his Mind the Romans.*

2. For, saith Cicero, all those whose Lives are in the Power of others, often consider what they can or may do, or at whose Mercy they lie, rather than what they ought to do. So says the same Cicero for Ligarius,

It

It is the third time that he continued in Africk after the coming of Varius, which if it be a Crime, it is of Necessity, not of Will. And Julian took this course in the Case of the Aquileians, as Ammianus testifies, who when he had ordered the Punishment of a few, adds, he let the others Escape, (c) as whom Necessity, not Choice, had forced into Arms. Thus says an Ancient Commentator on that place of Thucydides, of the Corcyrean Captives that were sold, πὸ ἤμερον τῷ ἑλληνικῷ τρεῖς δ'ηλοῖ, &c. He shewed an Heroick Clemency like a true Grecian, for it

(c) *Whom Necessity, not Choice, had forced.*] He presently adds, the easy and merciful Prince did it upon deliberate Equity. And Thucydides, B. 3. in Cleon's Oration. I pardon them who were forced into the Enemy's Service. This is called the Consideration of an Extreme Necessity, by Paulus, Sentent. 5. Tit. 1. For certainly (as Synesius says) Necessity is a strong and violent thing. And Juvenal concerning the Calaguritani.

Quisnam, &c.

*With long Siege distress'd,
And all Extremities of War oppress'd:
Till to such meagre Spectacles reduc'd,
As even Compassion in the Foe produc'd.*

Tate.

See Cassiodore of the Necessity of Hunger. 9. 13. Pertinax of Latus, and others. They unwillingly obeyed Commodus; but when they had an Opportunity, they shew'd that they were willing. Cassius Clemens in Xiphilinus of the Affairs of Severus, says, I neither knew you, nor Niger; but being left in that part which he obtained, I acted as Necessity obliged me; I obeyed the (Commander) present, not intending to make War upon you, but to repel Julian. Aurelian making his Entry into Antioch, where many had followed the Party of Zenobia, published a Proclamation, referring all that they had done to a forcing Necessity, rather than to their Will. And Belisarius in Procop. Vandal. 1. says, that all the Africans unwillingly obeyed the Vandals. In the same Gorth. 3. Totilas tells the Neapolitans, that he knew they were unwillingly under the Enemy. But Nicetas, or he that continues his History, speaking of Henry the Brother of Baldwin, says, he commanded the Citizens to be slain, as if they had been a Herd or Flock of Cattle, not Christian Men that were killed, especially such as had not voluntarily but by force obeyed the Blachi, nor did willingly serve them.

it is inhuman to kill Prisoners after the Battle is over, especially Servants, who do not fight of their own Choice. The Plateans thus argue in the aforesaid Oration of Isocrates, *We did not serve them willingly (the Lacedemonians) but were forced to it.* And so for the other Grecians, *They were forced with their Bodies to join with them, but their Hearts were with you.* Herodotus also says of the Phocians, ἐμῆς ἰζον ἢ ἐκόντες, ἀλλ' ὑπ' ἀνάγκης, *They followed the Medes not Voluntarily, but forced by Necessity.* Alexander spared the Zeldi, as Amianus relates, *Because they were forced into the Service of the Barbarians.* Diodorus makes Nicolaus the Syracusan thus plead for the Captives, *The Allies being forced to make War, wherefore as it is but just that they should be punished, who designedly offer the Wrong; so it is equally just to pardon them, who offend against their Will.* So in Livy, the Syracusans to excuse themselves to the Romans, said, *they broke the Peace, being over-reached by Fear and Fraud.* Thus Antigonus declared, *that he made War with Cleomenes, not with the Spartans.*

IV. Nor
for an In-
tervening
Fault be-
tween Mis-
fortune and
Fraud,
whose Na-
ture is ex-
plained.

IV. 1. But it is to be observed, that between an Absolute Injury, and a mere Misfortune, there often intervenes something of a middle Nature, as it were composed of both, so that the Action cannot be said to be either entirely of Knowledge and Voluntarily, nor absolutely of Ignorance and against the Will.

2. Aristotle calls this Act ἀμαρτημα, in Latin rendered culpa, an Offence. For thus he says in the 5th Book of his Morals, and the 10th Chapter, *Of Voluntary Actions, some we do deliberately, others not. They are said to be done deliberately, which are acted by a certain previous Consultation of the Mind; what are otherwise, we say are done unadvisedly.* Since then in human Society an Injury may be done three several ways, that which proceeds from Ignorance

is termed a *Mischance*. As, if a Man should do a *Mischief* to one whom he did not design to hurt, or what he did not really intend, or not in the manner he intended it, or not with the like effect; as if any one did not think to strike with this Instrument, not this Man, or not upon this account; but it happened otherwise than he proposed to himself: Allow he designed to beat him, not to wound, either not this Person, or not in this manner. Therefore if a *Damage* happen accidentally, not designedly, it is a *Mischance*; but if it might in some manner have been expected or foreseen, tho' not with an evil intent, it shall be a sort of *Fault*: For he is accessory to a *Fault*, who acts by a Principle within him; but he that does it without, is unfortunate; but when a Man does knowingly what he does, tho' not deliberately, it is acknowledged that an *Injury* is done: As whatsoever Men may do through *Anger*, or other like *Disturbances* of the *Mind*, either *Natural*, or *Necessary*; for they who in *Passion* do *Mischief*, are guilty of a *Fault*, and commit an *Injury*, neither yet are they not reckoned unjust or malicious. But if a Man should do it deliberately, he is rightly accounted wicked and unjust.

3. Therefore whatsoever is done through *Anger*, is judged with *Reason* not to be done premeditately; for he does not begin the *Quarrel*, who in a *Passion* does an *Injury*, but he that provoked that *Passion*. Hence it is, that in passing *Judgment* in such Cases, the *Question* is not so immediately after the *Fact*, as the *Occasion*; for *Anger* generally arises from hence, that a Man thinks himself affronted. Therefore the *Query* is not here, as in *Contracts*, whether done, or not; for there, unless there be a *Pretence* of *Forgetfulness*, one of the *Parties* must of necessity be *Unjust*, in not performing the *Contract*, but in this they demand, whether what was done were justly done. For he that first offered the occasion did it knowingly, wherefore no wonder if the one Person thinks himself wronged, and the other not.

But it is also possible, that the Person that does this in Anger should be accounted unjust, viz. if his Revenge exceed the bounds of Justice, and the Provocation; so he is truly just who acts justly with Deliberation, for sometimes a Man may do a thing willingly, but not deliberately.

4. But of those Wrongs that are not done voluntarily, some may be pardonable, others not; (d) those are pardonable that are done not only by Men ignorant, but through Ignorance also. But if any be done by ignorant Persons, but not through Ignorance, yet with such an eagerness of Mind, as exceeds the common bounds of Human Nature, they are no wise pardonable.

5. Michael Ephesius interpreting that place of a thing that might not be expected, gives us the Instance of a Son, who by the opening of a Door, has hurt his own Father: Or in a solitary Place trying to shoot, has accidentally wounded a Person; and of that which might have been foreseen, but without any evil intent; he instances in a Man shooting at random in a Highway. The same Author gives us an Example of Necessity in him, who obliged by Hunger, or Thirst, is forced to do any thing. Those of Natural Perturbations (Disturbances) he ranks under Love, Grief, Fear. He says that is done through Ignorance, when the Fact is unknown as if a Man did not know a Woman was Married; a Crime is done by a Person Ignorant, not through Ignorance, where the Law is not known. But this Ignorance of the Law may sometimes be excused, and sometimes not; all which will agree with

(d) Those are pardonable that are done not only by Men ignorant, but also through Ignorance.] Dionysius Halicarnassensis says, B. 1. Whatsoever is done unwillingly, deserves pardon. And Procop. Goth. They who have injured others, whether through Ignorance, or a sort of Forgetfulness, ought to be forgiven by those whom they have offended.

with the Opinion of our Civilians. There is a place in *Aristotle* not unlike this, in his Book of the Art of Oratory: *Equity distinguishes between Wrongs and Trespasses, and between Faults and Mischances; but Mischances are which could neither be foreseen, nor done with an ill design. Faults, those that might have been foreseen, but not done with an evil Intent; but Injuries, which have been done both designedly, and with a malicious Intent.* The Ancients particularly remarked these three, *Ignorance, Improvidence and Wilfulness*: As *Homer* relates in the last of his *Iliads* concerning *Achilles*.

οὐτε γὰρ ἐστ' ἄφρων, ἔτ' ἄσκοπος, ἔτ' ἀλγίμων.

Not Ignorant, nor Rash, nor ill Disposed.

6. The like Distinction is also in *Marcion*, *We offend either purposely, rashly, or accidentally. Purposely, as Thieves who make it their constant Practice. Rashly, when a Man in Drink falls to fighting with Fists or Sword. Accidentally, when in Hunting an Arrow levelled at a Deer, kills a Man.* Those two which are done Purposely and Rashly, *Cicero* thus distinguisheth, *In all Acts of Injustice it is highly to be considered, (e) whether they be done by any perturbation of Mind, which is generally short, and quickly over; or with Judgment, and Deliberation.*

N 2

For

(e) *Whether they be done by any Perturbation of Mind, which is generally short, and quickly over; or with Judgment and Deliberation.* Seneca of Anger, 1. 16. *A wise Man often forgives Injuries, if he be sensible that they do not proceed from a deep Root but from sudden flights of Passion (as they say); and again, sometimes he forgives great Offences, sooner than small ones, if they be done through Infirmary, not Cruelty; for in these last there is a latent, manifest and inveterate Rancour; and a little further, he will not punish the same Fault in two Persons alike, if the one did it unadvisedly, and the other with Design.*

For those are much slighter, which are done by some sudden flight, than they done premeditatedly and designedly. (f) Philo in his Explanation of some particular Laws, says, *It is but half a Crime, which is not done deliberately.*

7. Of which kind are those chiefly, which Necessity, (g) if it does not defend, yet excuses; for as Demosthenes argues against Aristocrates, ἀναγκάται χρεῖται τὸ τι περὶ γένειον, &c. The coercive Impulsions of Necessity take from us the discerning Judgment of what should be done, or not done; wherefore such cases are not to be too strictly searched into by equitable Judges. Which Point the same Author (Demosthenes) handles more largely in his Oration of false Witness against Stephanus. As also Thucydides in his fourth Book, πᾶν δ' εἰκός, &c. It is highly probable, (h) that God himself is willing to forgive those, who obliged by War, or otherwise necessitated, have committed involuntary Acts; for the Sacred Altars have been ever allowed sure Places of Refuge for them to fly unto, as have unwillingly offended; and they are to be reputed heinous Offenders, who are willingly so; not they whom extreme Necessities have drove to bold Attempts. The Cerites in Livy thus address the

(f) Philo.] B. 2. of Special Laws.

(g) Which Necessity, if it does not defend, yet excuses.] Add what is above, B. 2. Cap. 20. § 29. and already in this Chapter, § 3. Thus the Samians in Thucydides, B. 3. said to Alcidas the Lacedemonian, when he put to Death the Chian Prisoners, He was mistaken to say, that he came to set Greece at Liberty, who killed Men who had been in no respect his Enemies, but as Allies to the Athenians, to which they were also forced. And St. Chrysostom of Providence, 5. Adversary can forgive Adversary, and Enemy an Enemy, when unwillingly, and against their intent, they have done any thing against them, tho' very heinous. And the Misimians in Agathias, 3. said, when having suffered many Indignities, they were forced to a Retaliation, indeed with a barbarous Violence, yet they were not altogether unworthy to be forgiven, and spared.

(h) That God himself is ready to forgive those.] Deut. 22. 26. Moser Maimonides, Duel. Dubit. 3. 41.

the Romans, that they would Construe that a deliberate Act, which was more justly to be called Force or Necessity. And Justin says thus, The act of the Phocians, tho' all condemned it for its heinous Sacrilege, yet it brought a greater Odium upon the Thebans, who perfectly forced them to it, than upon themselves. And this is the Opinion of Isocrates, of him who steals purely to keep himself from starving, ἔχει πρὸς ἡμῶν τῆς ἀδίκας τὴν ἀνάγκην, he hath Necessity, a good Plea for Pardon. Also Aristides in the second Leuctrice says, The hardness of the Times is some Excuse for those that fly. Thus says Philostratus of the Messenians, that they did not receive those that were banished from Athens, ἡ ἀπολογία τοῦ ἔργου ἵσταται, &c. They could not safely do it for fear of Alexander, whom all Greece severely dreaded. And thus we find in Aristotle, ἡμιπονηρὸς ὃς ἐκ ἀδίκου ἔστι καὶ ἐπιβέβηκε, half wicked, but not unjust, (h h) nor a liar in wait. Themistius in his Praises of the Emperor Valens, thus applies these Distinctions to our purpose, (i) You have well distinguished between a real Injury, a Fault, and a Misfortune; (k) tho' you are not acquainted either with

N 3

Plato,

(h h) Nor a lyer in wait.] Thus Cleon in Thucydides aggravates the Crime of the Mityleneans, They did not hurt us unwillingly, but they designedly lay in wait for us; but that only deserves Pardon, which is done unwillingly. Philo in his Book of instructing a Prince, says, If he must proceed to Revenge, he knew how to distinguish between those who lead a malicious wicked Life. and those who are of quite different temper; for to put to Death all that have any ways offended, is Savage and Barbarous.

(i) You have well distinguished, between a real Injury, a Fault, and a Misfortune.] Seneca, Natural. 2. 44. speaking of Thunderbolts, They would advise us how we should chastise the Sins of Men; for all are not to be punished in the same manner, some are to be discouraged, some to be crush'd, and curbed, and some to be advised.

(k) Tho' you are not acquainted with Plato and Aristotle, yet you put in practice their Precepts.] Such was Trajan eminent among the Roman Princes, His Accomplishment did not consist in words, but yet he under-

Plato, or Aristotle, yet you put in Practice their Precepts; for you have not judged them worthy of the same Punishment, who from the first advised the War, and those who afterwards were forcibly engaged in it, and those who submitted to him, who proved the Conqueror. But those you have condemned, these you have Corrected, and the last received unto Mercy.

8. The same Author in another place advises a young Emperor, *τι διενήνοχεν ἀτύχημα, καὶ ἀμαρτήματα, καὶ ἀδίκημα, &c.* Consider what difference there is between a Misfortune, a Fault, and a direct Injury; and how it becomes a Prince to forgive the first, chastise the second, and severely punish the third. Thus, according to Josephus, did Titus the Emperor punish only the Principal in a Crime, *μέχους ἱππας*, in a severe manner; but the Multitude *μέχους λόγους*, only with threatening words. Bare Misfortunes neither deserve Punishment, nor engage us to make any Restitution; but unjust Actions are obnoxious to both. But the fault of a middle Nature, as it is liable to Restitution, so often it does not merit Punishment, especially Capital. To this we may refer that of *Valerius Flaccus*.

*At quibus invito maduerunt sanguine dextræ,
Si sors seve premat miseros, sed proxima culpæ
Hos variis mens ipsa modis agit, & sua carpunt
Facta viros refides ———*

*But those who by chance imbrue their Hands in Blood,
Press'd by Misfortune, tho' not the greatest Crime,*

Yet

understood the matter, and practised it really, Xiphilinus. Thus says Herodian of Marcus Aurelius, He was the only Prince who shewed his Wisdom, not in Words, or dogmatical Knowledge, but in grave Manners, and a temperate Life. And Xiphilinus of Macrinus, He knew not the Laws so exactly, as he faithfully executed them. God grant such Princes in our Days!

*Yet conscious of a Guilt, feel Loads of Anguish,
Remorse distracts 'em, and the hideous Image
Still stares them in the Face.*

V. We meet with frequent Examples in History, of (1) different Punishments inflicted on the principal Authors of a War, and those who have been drawn into it; (as *Themistius* observes) *Herodotus* relates, that the Grecians took an Exemplary Punishment on those who had been the chief Authors of the *Thebans* Revolt to the *Medes*. Thus (as *Livy* tells us) that the Principal Men of *Ardea* were beheaded. In the same Author, *Valerius Levinus*, having taken *Agrigentum*, he whipt their chief Leaders with Rods, and then beheaded them, the rest and the Prey he sold. Also in another place of the same *Livy*, When *Atella* and *Calusia* were surrendered, their Leaders were put to Death. Again in another place, (he addresses the R. Senate,) Since the chief Authors of this Rebellion are deservedly punished by the immortal Gods, and by you, O ye Senators, what do you intend to do with the innocent People? At last they were pardoned, and their City restored; to the end (as he says) where the Fault begun, there the Punishment should stop. *Eteocles* the *Argive* is highly commended in *Euripides*, because

V. The Principal Authors of a War to be distinguished from those drawn into it.

*When he was Judge, the Guilty always bore
The Weight of their own Faults; the People never
Groan'd with the Burden of their Rulers Crimes.*

And the *Athenians* (as *Thucydides* relates) repented of their Decree against the *Mitylenians*, That they

N 4

should

(1) Different Punishments inflicted on the Principal Authors of a War.] See *Gailius*, B. 2. page publ. cap. 9. n. 18.

should destroy the whole City, rather than the Principal Authors of the Revolt. Demetrius is also reported by Diodorus, when he took Thebes, to have put only ten of the chief Leaders to the Sword.

VI. In the very Authors we must distinguish of the Causes, whether probable, or improbable.

VI. 1. But also in the very Authors of the War, we must distinguish of the Causes; for there are some, not indeed Just, but yet such as may be imposed upon Men not really wicked. The Writer to Herennius lays down this as a most just Plea for Pardon, *If any one who hath offended, did it not out of any hatred to another, nor of his own cruelty, but out of kindness and good design.* Seneca's Wiseman, Will let his Enemies go off safe, even sometimes commended, if they were engaged in the War, upon honest Grounds, out of Loyalty, according to their League, for their Liberty. The Carites in Livy (m) beg Pardon of Cæsar for their fault, in assisting their Kinsmen the Phocians, the Chalcidians and others, who had aided Antiochus according to their League made with the leave of the Romans themselves. Aristides in his second *Leuctrice*, speaks of the Thebans, who under the conduct of the Lacedemonians marched against the Athenians, They were indeed engaged in an unjust Action, but with a fair Plea, they did it in Obedience to the Princes of their League.

2. Cicero in his first Book of Offices, says, they are to be pardoned, who have not been cruel, nor inhuman in the War. Also, that Wars undertaken for the Glory of Empire, are to be managed with less Severity. Thus King Ptolemy signifies to Demetrius, *That they did not make War for Gain, but for Glory* and

(m) Beg Pardon of Cæsar for their Fault.] Sometimes we must pardon a Ruler overcome in War, being ignorant of what is Just. Ammianus transcribed this out of Isocrates, B. 30.

and Empire. And so Severus (n) in Herodian, *When we first made War against Niger, we had not any specious Pretences of Quarrel against him; but the Empire of the World being the Prize disputed for, both of us with equal Ambition contended for it.*

3. That often happens, which Cicero observed in the War between Caesar and Pompey. There was a great Uncertainty, there was a Quarrel between the most famous Commanders, many could not tell whose Cause was best. And what he also says in another place, *Tho' we be guilty of a failing through human Frailty, yet we are certainly free from Wickedness.* As in Thucydides, those Acts are positively declared pardonable which are done, *μη μὲν κακίας, ὁξὺς δὲ μάλλον ἀμαρτία*, Not out of Maliciousness, but rather a culpable Ambition of Glory. The same Cicero says of Deiotarus, *He did not engage out of any hatred to you, but slipt through common Frailty.* And Sallust in his History, *The rest of the Multitude, rather in a tumultuous way, than led by their own Judgment, follow one another, each reputing his Leader wiser than himself.* What Brutus writ of Civil Wars, may not improperly be applied to all Wars, (o) *They should be more strictly managed, than to allow Cruelty to be exercised on the conquered.*

VII. 1. Even where Justice demands it, yet it is often agreeable to Goodness, (p) to Modesty, and

VII. Even to Enemies who have deserved Death, oftentimes the Punishment may justly be remitted.

(n) In Herodian.] The words are Greek, *When we first engaged in War with Niger, we had no fair pretence for it; but the Empire being then in dispute, and the Title uncertain, either of us strove to obtain it for himself.* Very well.

(o) They should be managed with more strict Discipline, than to allow Cruelty to be exercised on the conquered.] Bembo 9.

(p) It is agreeable to Goodness, to Modesty.] King Theodorick in Cassiodore, 112. 41: *Those Wars have succeeded happily to me, which have ended moderately, for he is daily a Conqueror, that knows how to use Temperance.*

and a great Soul to forgive. *Salust* says, *That the Romans advanced their Greatness by forgiving. And Tacitus, We ought to shew as much Favour to Suppliants, as Courage against the Enemy. But Seneca, That the most generous of Beasts, scorned to tear and pursue the mean and vile. Elephants and Lions pass by what they have overcome. That Advice of Virgil is always seasonable.*

— *Non hic victoria Teucrium
Vertitur, aut anima una dabit, discrimina tanta.*

*If I survive, shall Troy the less prevail?
A single Soul's too light to turn the Scale.*

Dryden.

2. There is a remarkable place to the same purpose, in the fourth Book to *Herennius*. Our Ancestors well observed, to put no Captive King to Death. And why? It would be unjust to abuse that Power which Fortune hath bestowed on us to the Destruction of them, whom the same Fortune a little before had placed in the most eminent Station. What because he brought an Army against us? I now absolutely forget it. Why so? Because it is the part of a brave Man to hold Men his Enemies, whilst they are in a Condition to dispute Victory, and to consider them as Men, when vanquished; that so Valour may finish the War, and Humanity crown the Peace. But (you will say) suppose he had got the Victory, would he have done the same? Why then should you spare him? Because it is my Practice to despise such Folly, not to imitate it. If you understand this of the Romans, (which is uncertain, since the Author brings in many strange and fictitious Stories) it is absolutely repugnant to that, which we meet in the Panegyric of Constantine, the Son of Constantius. Tho' he be the more prudent Man, who can firmly oblige conquered Rebels by

by a Pardon, yet he the more valiant, who can insult the vanquished. You have revived (O Emperor) that ancient Boldness of the Roman Empire, which always put the Generals of the Enemy, whom they had taken Prisoners, to Death. For when the Captive Kings, after they had attended the triumphant Chariot of the Conqueror, from the Gates to the Forum, as soon as ever he turned his Chariot to the Capitol, were dragged to Execution. Except only Perseus, who by the particular favour of Paulus Æmilius, (to whom he had yielded himself) escaped this severe Punishment. But the rest (q) having their Eyes pluckt out, continued in Chains, a warning to other Kings, rather to Court the Friendship of the Romans, than provoke their Justice. But this is too much at large. Josephus in his History mentions the like Severity of the Romans in the Death of Simon Barjora; but he speaks of Generals, such as Pontius the Samnite, not of those, who had the title of Kings. The meaning of his words may be taken thus. The Conclusion of the Triumph was when they were come to the Capitol,

(q) Having their Eyes put out, they continued in Chains, a warning to other Kings.] I would not have this Custom practis'd, yet Joshua put to Death the Kings which he had taken Prisoners. Josephus Antiq. Hist. 5. 1. and of Sorsius Dion, He whipt Antigonus with Rods, being fastned to a Cross; but wisely adds, Which no King ever suffered from the Roman Conquerors. We have the same Story in Josephus, B. 15. and Eutropius relates of Maximianus Herculus, B. 10. having killed the French, and the Germans, and taken their Kings Prisoners, he exposed them to the fury of the wild Beasts, when he had made a stately shew of Kindness. See Ammianus of a King of the Germans that was crucified, B. 27. Theodorick King of the Visigoths put to Death Athinulfus King of the Suevi in Spain, according to Janandes Histor. Goth. Certainly these are warning to Kings to behave themselves moderately, and to consider, that they themselves are subject (when it is pleases God) to human Misfortunes; and what Cræsus in a like Danger remembered had been spoken by Solon, that we must not judge any Man happy before his Death.

Capitol, the Temple of Jupiter, for there by ancient Custom the Conqueror stayed, till he had Notice of the Death of the Enemy's General. This was Simon the Son of Jora, who was led among the Prisoners in Triumph: He then having an Halter thrown about him, is hurried to the Market-place, his Keepers also whipping him on: For in that Place it is the Custom of the Romans to put to Death, those that are condemned for capital Crimes. As soon then as it was declared, that the Person was dead, they proceeded to their joyful Rites and Sacrifices. Cicero almost writes the same of Punishments, in his Oration against *Verres*.

3. We have many Examples of Generals, thus executed, and some of Kings, as (r) of *Aristonicus*, *Jugurtha*, *Artabasdus*. Yet besides *Perseus*, (s) *Syphax*, *Gentius*, *Juba*, and in the time of the *Cæsars*, *Caractacus*, and others escaped this Punishment, that it may appear that the Romans had respect to the Causes of the War, and the manner of prosecuting it; whom yet Cicero, after some others do acknowledge to have been too severe after a Victory. Therefore *M. Æmilius Paulus* in *Diodorus Siculus* well advised the Romans in the Case of *Perseus*: Though they fear not the Power of Man, yet they ought to dread the Divine Vengeance falling on them for insolently abusing their Victories. And (t) *Plutarch* observes, that in the Grecian Wars, the very Enemies refrained all Violence to the Lacedæmonian Kings in respect to their Dignity.

4. An

(r) Of *Aristonicus*.] See *Appian*, *Mithrid.* at the end.

(s) *Syphax*.] *Historians* differ concerning him. Some say that he died near Rome before the Triumph. *Polybius* says, that he was led in Triumph: and *Appian*, that he died of Sickness, whilst they were debating about him.

(t) *Plutarch* observes.] of *Agis*.

4. An Enemy then who hath not respect purely to what human Laws allow, but what is really his own Duty, and what Justice and Piety require, will spare even his Enemy's Life; and will condemn no Man to Death, unless in defence of his own Life or *Estate*, or for proper personal Faults, which immediately deserve Death. Nay, and to some of those that deserve it, either in Consideration of human Frailty, or other some probable Reasons, he will either remit all Punishment, or at least the Capital part. The same fore-mentioned *Diodorus Siculus* excellently observes, *The taking of Cities, successful Battles, and other Prosperities of War, are often more owing to Fortune than Valour. But to shew Mercy to the vanquished is the effect of high Prudence in the greatest Men.* We read in *Curtius*, though Alexander had just Reason to be angry against the *Authors of the War*, yet he forgave them all.

VIII. What I said before, holds good concerning the Death of those, who are accidentally killed, if not for Justice, yet for Pity we must not attempt any such thing, which may prove the Destruction of many Innocents, unless for some extraordinary Reasons, and for the Safety of many. *Polybius* is of the same Opinion, who in his first Book thus speaks, *ὃ γὰρ ἐπὶ ἀπωλείᾳ δὲ καὶ ἀφανισμῷ τοῖς ἀγνώμοσι πολεμεῖν τὰς ἀγαθὰς ἀνθρώπους, &c.* *It is the part of a good Man not to prosecute a War to the utmost against those that are wicked, but only so far, till they have made Satisfaction for, and amended their Crimes, and not promiscuously to involve the Innocent in the Punishment of the Guilty, but for the sake of those Innocents even to pardon the Guilty.*

IX. 1. These things being premised, the defining of things more particular will not be difficult.

(u) Tender

VIII. We must take all possible Care that the Innocent be not unadvisedly killed.

IX. Children to be spared, and Women, unless highly Criminal, and also old Men.

(u) *Tender Age must excuse the Child, and her Sex the Woman*, (says Seneca in his Books against Anger). God himself in the Wars of the Hebrews, even

(u) *Tender Age must excuse the Child, and her Sex the Woman.* Pliny, Nat. Hist. B. 8. cap. 16. *When the Lion is in a Rage, he preys upon Men, before Women, and never touches Children, but in extreme hunger.* Upon those words of Horace, B. 4. Ode. 6. of Achilles,

Nescios fari pueros Achivum, &c.

*And when strong Fates had Troy o'ercome,
To Savage he ah! ah! with Grecian Flames
Had burnt the Breeding Dames,
And in their Mother's burning Womb
Poor harmless Infants found a hated Tomb.*

Creec'h.

he passionately complains of the Cruelty of Achilles, who (if Apollo would have let him lived) was so unmerciful, that he would not have spared either Infants, or Women big with Child. And Philo of the Instruction of a Prince, Let Maidens, and Women be dismissed safely; he gives the Reason, It is unmerciful, that Women should be added to the Men, that make War. And the same Author in his Special Laws, 2. there may be a thousand Pretences for Men to Quarrel, and fall out with Men. But Malice it self can have nothing to say against Infants, who are but newly come into the World, being entirely Innocent. Josephus. Antiq. Hist. B. 20. of Manacmus. Not so much as sparing Infants, he left nothing remaining for Cruelty, or rather savage Ferity. For he exercised upon his own Country men, what have been unpardonable, if he had done it to Foreigners, whom he had overcome in War; and the same Josephus Records, that Judas Macabaeus having taken Bosra and Emphrone, killed all the Males, and whosoever was able to fight; and in another place he calls that Punishment, which Alexander surnamed Thracidas inflicted on the Jewish Women and Children, absolutely inhuman. Agathias B. 3. Since it was impious to exercise Rage and Cruelty on Infants newly born, that are ignorant of their Father's Crime, therefore they themselves did not escape. Nicetas, or he that continues his History to the Times of King Henry, writing of the Scythians who took Athira, says, Neither were the sucking Infants exempted from their Rage, but were either mowed down like Grass, or pined away like Flowers (for want of nourishment.) An Act of Men divested of Humanity, and having no Sense of the wrong done thereby to Nature it self, and the breach of the Law of Mankind, by extending their Cruelty, beyond what

was

even after Peace, offered, and refused, would have Women and Infants spared, only some few Nations excepted by a special Command, against whom the War was not called the War of Men, but of God. And when he ordered the *Midianitish* Women to be slain for their own personal Crimes, he yet excepted those that were pure Virgins. Nay when he denounced fearful Judgments on the *Ninevites*, for their enormous Sins, he was pleased to delay the deserved Vengeance in Compassion of so many thousands, who could not distinguish between Good and Evil. Like to which is that in *Seneca*, *Can any one be angry with Children, whose Age as yet understand not the difference of things?* And in *Lucan*,

Crimine quo parvi cædem potuere mereri?

How could young Infants ever merit Death?

If then God himself both does, and commands this, who without any apparent Cause may with Justice destroy Persons of whatsoever Sex or Age, as being the Giver and Lord of Life; what ought Men (to whom he hath given no other Rights over the Lives of their Fellows, than what is immediately necessary to preserve the Safety and Society of Mankind) to do in this Case?

2. Let us then first consider the Judgment of these Nations, and Times, wherein Justice most prevailed concerning Children. *We carry Arms* (says *Camillus* in *Livy*) *not against that tender Age, which is spared even at the taking of Cities, but against those*

was requisite for the defeating and subduing their Enemies. Add that of *Beda*, B. 2. cap. 20. of the savage Cruelty of *Caravolla*, and the good Law of the *Helvetians*, and the pious Mandates of *Queen Elizabeth* in *Cambden*, in the Year 1596.

those who are in Arms. He adds, that this belongs to the Natural Rights of War. *Plutarch* treating on the same Subject, tells us, *Good Men observe even some Laws of War*. Where, pray observe, he saith, *Good Men*, that you may distinguish this Right from that allowed by Custom and Impunity. So *Florus* says, it cannot in Equity and Honesty be otherwise. And *Livy* has it in another Place, *Which Age, the Enemy, though highly provoked, should spare*; and again, *Their savage Cruelty and Rage reached even to harmless Infants*.

3. What Compassion in all Ages has been shewed to Children not come to the use of Reason, is generally allowed to Women, unless they have personally deserved Punishment, or else have themselves done the Duty of Soldiers as Men. For that is, as *Statius* expresses it,

Sexus rudis insciusque Belli,

A Sex unskill'd, and ignorant of War.

The Commander in the Tragedy replies to *Nero*, calling *Octavia* as Enemy,

——— *Femina hic nomen capit?*

(x) *Can a Woman deserve that Name?*

And *Alexander* in *Curtius*, *I use not to make War with Captives and Women. He must be in Arms, that I take for an Enemy*. So *Grypus* in *Justin*, *None of his Ancestors after Victory did ever in all their Wars, either Foreign or Domestick, shew Cruelty to Women,*

(x) *Can a Woman deserve that Name?*] Therefore *Tucca* and *Varrus* would have those Verses blotted out of the second *Æneid*, where *Æneas* deliberates of killing *Helena*.

Women, whom their very Sex did fully secure from the hazards of War, as the fury of the Conqueror. And another in Tacitus, That he never made War against Women, but only those that were actually in Arms against him.

4. Valerius Maximus calls the Behaviour of Munatius Flaccus against Women and Children, A barbarous Cruelty, and not fit to be mentioned; Diodorus tells us, that the Carthaginians at Selinus killed old Men, Women and Children, *ἄσπλαγ συμπάθειαν λαμβάνοντες*, without any manner of Compassion; and in another place he calls this Act a savage Cruelty. Latinus Pacatus stilled Women, A Sex, which the Wars spare. And so did Papinius of old Men.

Nullis violabilis armis

Turba senes

Old Men should be from Violence secur'd.

X. i. What we have said (of Women and Children) may be generally said of all Men, whose manner of Life is wholly averse to Arms. By the Laws of War, only those that are in Arms, and do resist, are exposed to be killed, according to Livy, that is, that Law which is agreeable to Nature. So says Josephus, It is just, that they should suffer by Arms, who have taken up Arms, but the innocent should not be touched. When Camillus had taken the City of Veii, he ordered, that they should not hurt those that were not in Arms. In the first Rank of these ought to be held, those who are engaged in holy Things. For as it was formerly the general Custom of all Nations to excuse them from bearing Arms, so were they excused also from the Violence of Arms. Thus the Philistins, tho' profes-

X. Priests
and Students
to be spared.

fed Enemies of the Jews, spared the (y) College of Prophets at Gaba, as you may find, 1 Sam. x. 5, and 10. And so to another place where was a like College, as it were set apart and Privileged from all Violence, did David flee with Samuel, 1 Sam. c. xix. v. 18. Plutarch informs us, when the Cre- tans were engaged in Civil Wars, they mutually forbore all manner of Violence (z) to the Priests, and those who had the charge of burning the dead. To this we may apply the Greek Proverb,

Ὁυδὲ πυρροβός ὑπὲρ ἐκφθι.

Even the Fire-carrier was Sacrificed.

(a) Strabo observes, when all Greece was up in Arms, the Eleans, as Sacred to Jupiter, and those that sojourned among them, enjoyed a secure Peace.

2. They also had justly this same Privilege, as the Priests, who have devored themselves to a Solitary Life, as Monks, and their Converts, that is Penitents, whom the Ecclesiastical Canons, according to natural Equity, would have spared equally as Priests. To these we may justly add those

(y) The College of Prophets.] Hyrcanus when he besieged Jerusalem, sent Sacrifices to the Temple, as the Jews relate. So the Goths are commended by Procopius, Goth. 2. for sparing the Priests of the Church of St. Peter, and St. Paul without Rome. See the Addition of Charles the Great to the Law of the Burgundians, and the Law of the Lombards, B. 1. tit. 11. 14.

(z) To the Priests.] Servius upon the 7th Æneid, For if his Office did not secure him from the violences of War, at least his Priest

(x) Strabo observes.] And Polybius, B. 4. and Diodorus Siculus excerpt. Peires. So also they who went to exercise at the Olympian, Nemean, and Isthmian Games, had a Protection and Security in time of War, as Thucydides informs us, B. 5. and 8. And Plutarch in the Life of Aratus.

who apply themselves to the study of Sciences and Arts beneficial to Mankind.

XI. Next to these, the Canons privilege Husbandmen. *Diodorus Siculus* highly commends the Indians, *In their Battles they kill one another (without Mercy) but they do not harm to the Husbandmen, as being necessary for the publick good.* *Plutarch* says of the ancient Corinthians and Megareans, *None of them would in any wise hurt the Husbandmen.* And *Cyrus* sends to the Assyrian King, *He was desirous that Husbandmen should be secure and indemnified.* And *Suidas* says of *Belisarius*, *He was so favourably inclined to Husbandmen, and took such a particular care of them, that whilst he was General, there was no manner of Violence done to them.*

XI. And also Husbandmen.

XII. Next to these the Canon includes Merchants, which is not to be understood only of those who sojourn for a time in an Enemy's Country, but for such as are continued Subjects, because the manner of the Life they use is entirely averse from War: And under this denomination are comprehended all sorts of *Mechanicks* and *Tradesmen*, whose immediate Interest makes them more inclinable to Peace than War.

XII. Merchants and the like.

XIII. 1. That we may come to those that bore Arms, I have already mentioned that of *Pyræus* in *Seneca*, who said we are forbidden by *Moderesty*, that is, in regard to Equity, to take away the Life of a Prisoner. We have quoted a Saying of *Alexander* to the same purpose, who allow Captives the same Privilege with the Women. We may add that of *St. Augustine*, (b) *Necessity, not Design, destroys the fighting Enemy. As Violence is*
O 2 allow-

XIII. And Captives, (or Slaves.)

(b) *Necessity not Design, destroys the fighting Enemy.* *Gratian* puts *de-primas* may bear down. *Plutarch* in the *Life of Marcellus*, says, that *Epaminondas*, and *Pelopidas*, neither killed any one after the Victory was gained.

allowable against one that is in Arms, and in a Case of Resistance, so is Mercy due to the Vanquished, or Captive, especially where there is no danger of the disturbance of the Peace thereby. Xenophon reports of Agesilaus, He ordered his Soldiers not to punish their Prisoners as Malefactors, but to preserve them as Men. And we find in Diodorus Siculus, They engaged stoutly against those that resisted, but shewed Mercy to the vanquished. The same Author also informs us of the Macedonians under Alexander. They were more severe to the Thebans, than the Laws of War generally allow.

2. Salust, in his History of Jugurtha, speaking of some young Men, who were put to Death after they had surrendered, says, it was done against the Law of Arms, that is, against the

Law

ed, nor brought Cities into Bondage; and it is thought that the Thebans would not have treated the Orchomenii in that manner, if they had been there. Marcellus imitated this at the taking of Syracuse, as the same Plutarch records. See the same Author in the Life of Cato Uticensis; When Cabades King of Persia had taken Armada by Storm, and had committed great Slaughter, an old Priest told him, that it was not like a King to kill his Prisoners; Procop. Persic. 1. who also says, Persic. 2. To be cruel to the conquered, is contrary to Piety. The same Author has an excellent Oration of Belisarius to his Soldiers at the taking of Naples. Goth. 1. And the Emperor Alexius, makes this Reply in Anna Comnena, to one that advised him to kill his Scythian Prisoners, Tho' they are Scythians, yet they are Men; tho' Enemies yet deserving of Pity. And in Gregoras. B. 6, Whatsoever is done in the heat of Battle is pardonable, because at such a time the Mind is as it were block'd up by a drunken Hand, and has not Reason for the Guide and Director of its Actions, but does what it does not consider; but when the Violence of Dangers is over, and our Reason has time to examine and judge of Things, and to give Orders for the Honour to execute, then if any indecent Action be committed, it discovers the evil disposition of the Person. Add another place of the same Gregoras which in these Notes we have put at the end of this 7th Book, and of the commendable Custom of the Poles, Chalcocondylas, B. 7. Julian in his second Panegyrick of Constantius, under whose Person he describes a virtuous Prince, says, Being conquered by Arms, he puts an end to the use of the Sword, reputing it impious, to kill a Man that can no longer defend himself.

Law of natural Equity, and the known Practice of all civilized Nations. And we read in *Lactantius*, *They spare the vanquished, and even in Arms there is room for Mercy.* *Tacitus* commends the first *Antony*, and *Varus*, two *Flavian* Commanders, *That after the Battle was over, they exercised no Cruelty to any.* So *Aristides*, *It is the Practice of Men in this Age to conquer by Arms those that resist, and to shew Mercy to those that submit.*

The Prophet *Elisha* asks the King of *Samaria* this Question about Prisoners of War, *Wilt thou kill those whom thou hast taken Captive, with thy Sword, and with thy Bow?* In *Euripides*, when one asked in the *Heraclide*,

Does your Law forbid the killing of an Enemy?

The Chorus answers,

Yes; when the Violence of War has spar'd him.

In the same Author *Eurystheus* the Captive says,

My Murderer shall be rank'd among the Guilty.

In *Diodorus Siculus*, the *Byzantians* and *Chalcedonians*, because they had slain many of their Prisoners, were branded with this Character, ἐπετέλεσαν ποταῖς ὁμότητι διαφερέσας, *They committed Acts of Abominable Cruelty.* The same Author in another place, calls (c) to spare Captives, τὰ κοινὰ νόμος, *An universal Law.* And they who transgress this Law, he says, without doubt, are guilty of a great Sin. Both Piety and Justice teach us to be merciful to Prisoners, as we mentioned before out of the Philosophical Treatises of *Seneca*. And

O 3

Histo-

(c) To spare Captives.] *Capitolinus* to *M. Antoninus*, he observed
even Equity to his Captive Enemies.

Historians highly commend those, who when the multitude of their Prisoners has been so great, that the number would be either chargeable or dangerous, have chose rather to send them all away freely, than to kill them.

XIV. Those
to be spared
who surren-
der upon fair
Terms.

XIV. 1. For the same Reason, (*d*) they that either in a Battel, or a Siege, shall demand Quarter, upon condition to save their Lives, are to be accepted. Wherefore *Arrianus* says, that the *Thracians* killing of their Prisoners that had yielded, was not done according to the *Grecian* Custom *ἐκ Ἑλληνικῆν σφαιρῆν*. Likewise *Thucydides*, in his third Book, *You received us unto Mercy, who voluntarily, and with Hands lifted up, craved a Surrender. And it is the Custom of the Greeks not to put such to Death.* And the *Syracusan* Senators, in *Diodorus Siculus*, tells us, *It is the part of a great Soul to spare a Suppliant.* And *Sopater* says, *It is the Law to preserve Suppliants in the Wars.*

2. In besieged Towns, the *Romans* observed this Custom before the Battering Ram struck the Walls. *Cæsar* declares to the *Adaticis*, he would save their City, if they surrendered themselves before the Ram touched the Wall; which is still observed, viz. in weak Towns, before the playing of the Batteries; and in Fortified Cities, before the giving of a Storm. But *Cicero* considering not so much what may be done, as what ought in Equity to be done, gives his positive Opinion thus, *Since we ought to take Care of those we conquer*

(*d*) They that either in Battel, or a Siege, shall demand Quarter upon condition to save their Lives, are to be accepted.] The *Romans* thus spoke to the *Persians*, who were besieged in the Fort *Petres*. *We indeed pity your hard condition, and are ready to spare you, should you desire to dye; and would save your Lives, which you so nicely do gain which becomes Christians. and Citizens of the Roman Empire.* See *Serranus* in the Affairs of *Francis I.* and *Henry II.*

quer, we should then take them into our Protection, who laying down their Arms, surrender to our Generals, tho' our Rams have battered their Walls. The Hebrew Expositors observe, that it was a Custom among their Ancestors, when they laid Siege to a Town, not to encompass it quite round, (e) but to leave one place free for them to escape, that desired to flee, that they might have less occasion to shed Blood.

XV. The same Equity commands us to spare those, who surrender to the Conqueror without Conditions in a suppliant manner. To kill those that have yielded, (says Tacitus) is barbarous. And Salust relating how Marius put to Death the young Men of Campania, who had surrendered, calls it, *An Act against the natural Right of War*. And the same Author in another place, *He put to the Sword not only those that were in Arms, and in Battle, by the Right of War, but the very Suppliants that cried for Mercy*. And (as I before mentioned) in Livy, *Killing of Armed Men, and those that resist, is allowed by the Right of War*. And the same Livy again, *He made War upon those that had submitted, against all Equity and Justice*. Nay, the chief business of a General should be rather to force his Enemies to a Surrender, than to put them to Death. It was highly commendable in Brutus, *He suffered not his Men to fall on the Enemy immediately, but surrounding them with his Horse, bid his Soldiers spare those who shortly would be their own*.

XVI. I. Against these Rules of natural Right and Equity, some Exceptions use to be made, no way

O 4

(e) Should leave one place free for them to escape, who desired to flee. Thus Scipio Aemilianus (as he was going to destroy Carthage) made Proclamation, let them flee that will. Polyb.

XV. They are also to be spared that surrender without Conditions.

way Just. *viz.* If it be done by way of Retaliation; if by way of Terror, to frighten others; or if they have been obstinate in their Resistance. But no Man can look upon this enough to justify a cruel Slaughter, who has seriously weighed what has been said before of the Just Causes of killing Enemies: For there is no Danger from Prisoners, or from those who have actually surrendered themselves, or desire to do it. That they may therefore be justly put to Death, there ought to be a previous Crime, and that such a one, as an impartial Judge shall think Capital. And so we sometimes see Prisoners, and those that have surrendered themselves, put to the Sword, and their yielding upon condition to have their Lives spared, not accepted; especially if they being satisfied of the Injustice of the War, have still continued in Arms; if they have abused the conquered with slanderous Reproaches, if they have broke their Faith, or any other Laws of Nations, as the Privilege of Ambassadors; or if they have deserted their Colours.

2. But Nature doth not allow Retaliation, unless against the personal Offenders; neither is it enough to pretend, that the Enemies are but one entire Body engaged against us, as may easily be understood from what hath been already said concerning the Communication of Punishments. We find in *Aristides*, *Is it not perfectly absurd, readily to imitate as just, what we our selves condemn as wicked and unjust?* Wherefore *Plutarch* blames the *Syracusans*, for putting to Death the Wives and Children of *Icetas*, purely because *Icetas* had before killed the Wife, Sister, and Son of *Dion*.

3. The Benefit which may follow from hence, by striking a Terror for the future, does by no means give a Right to put to Death. But if there

be any precedent just Cause, this may be admitted among other Reasons, to exclude Pardon.

4. Further, an eager Desire to maintain our own Party, if the Cause it self be not absolutely unjust, cannot really deserve Punishment, as the *Neapolitans* argue in *Procopius*; or if there were any Punishment due, it could never amount to that of Death, before an equitable Judge. When *Alexander* had commanded all the young Men in a certain Town to be put to the Sword, because they had made an obstinate Defence, he seemed to the *Indians* to make War like a Robber; whereupon the King fearing that Reflection, shewed more Mercy in his Victories. He more honourably spared some *Milesians*, because they appear'd generous and faithful to their own Country, which are the very words of *Arrian*. When *Phylo*, Prætor of the *Rhegians*, was hurried away to Torments and Death, for stoutly defending his City against *Dionysius*, he cried out, that he was thus barbarously used, because he would not betray his Country, the just Punishment for which the Gods would in a short time demand. *Diodorus Siculus* calls it *ἐν νόμῳ τιμωρίας*, Punishment contrary to Law. I much approve that Wish in *Lucan*,

Vincat, quicunque necesse
Non putat in victos sævum distringere ferrum.
Quique suos cives, quod signa adversa tulerunt,
Non credit fecisse nefas —————

May he be crown'd with Victory,
Who thinks it base to kill th' unhappy Vanquish'd;
Tho' in the Battel, with Minds truly Brave,
They stood against him. —————

But we must understand by the word *Cives*, not the Inhabitants of this or that Country, but the general

general Citizens of the World. Much less can the Grief for a Loss received by War, render the shedding of Blood Just and Lawful; as we read that *Achilles*, *Aeneas*, and *Alexander*, celebrated the Obsequies of their deceased Friends with the Blood of their Prisoners, or those that had yielded themselves; therefore *Homer* justly expresses it,

Κακὰ δ' ὅππῃσι μὲν τοῖς ἔργα,

(F) *And in his Mind did evil things devise.*

XVII. Of
fenders may
be pardoned
on account of
their multi-
tude.

XVII. But where the Crimes are such, as they really deserve Death, yet the Greatness of a Multitude may be some Plea to mitigate the Severity of the Punishment; a Pattern of which forbearing Mercy we have from God himself, who ordered a Peace to be offered to the *Canaanites*, and their Neighbours, tho' notoriously wicked, with the promise of Life under the Conditions of being Tributaries. To this agrees that of *Seneca*, *The Severity of a General is immediately necessary against particular Offenders, but where a whole Army is unanimously engaged in a Mutiny, a general Pardon is equally requisite. What abates the Anger of a Wise Man?* (g) *The Multitude of Offenders.* And in *Lucan*,

*Tot simul infesto juvenes occumbere Letho,
Sæpe fames, pelagique furor, subitaque ruina,*

Aut

(F) *And in his Mind did evil things devise.]* This seemed cruel to later Ages. *Servius* observes upon the tenth *Æneid*.

(g) *The multitude of Offenders.]* Where many offend, none are punished, says the Commentator of *Furval* out of *Lucan*. *Livia* in *Xiphilinus* out of *Dion*, If one would punish every such thing with Rigor, he is not sensible, that he must kill the greatest part of Mankind. *St. Austin* *Epist.* 64. Rather by advising than threatening; for so we must do with a multitude of Offenders: But we may exercise Severity upon a few. Add *Gaius* of publick peace, B. 2. cap. 5. 36.

*Aut Coeli, Terræque lues, aut bellica clades,
Nunquam pœna fuit* ———

*At once so many Youths to hurry into Death,
Hunger may do it, or Shipwrecks, or the quick
Amazing fall of Buildings, or Poison'd Air,
Or blasting Damps, or War; it can't be Punishment.*

Therefore (Cicero tells us) to prevent the shedding of too much Blood, they brought in the casting of Lots. And *Saturn* thus addresses *Cæsar*, Neither does any one provoke you to severe Punishments, or fearful Judgments, what rather tend to make a City desolate, than to restore it.

XVIII. 1. From what has been already mentioned, may easily be understood, what is allowable by the Law of Nature concerning Hostages. That it was formerly believ'd every one had the same Right over his own Life, as over other things wherein he had a Propriety; and that this Right, by the consent, either Express, or Tacit, of the Individuals, was transfer'd to a Society, was less to be admitted. If Hostages, personally innocent, were (as we read) put to Death for the Crimes of their Country, whether they were (first) delivered by their own particular Consent, or of the Publick, which may be inclusive of their own. But since a truer Wisdom has informed us, that God has reserved to himself the Power of our Lives, so that no Man can solely by his own consent bestow upon another a Power either over his own Life, or his Country-man's. Therefore (as *Agathias* writes) that good General *Narses* abhorred putting innocent Hostages to Death, as a brutish and cruel Act. So also have others done; witness the Example of *Scipio*, who used to say (b) That he would

XVIII. Hostages to be spared, unless personally faulty.

XIX

(b) That he would severely punish those who had really offended.] The same says *Julian* in *Eunorius*, Excerpts. Legat. 9.

would severely punish those who had really offended, but not the innocent Hostages; neither would he take Revenge of an unarmed Person, but of an Enemy actually in Arms.

2. But what our Modern Lawyers, and those not inconsiderable, maintain, that such Agreements are valid, if confirmed by Custom, I allow: If they mean by Right, only an *Indemnity*; which in this case often comes under this denomination. But if they suppose, that they who take away a Man's Life, only by virtue of such an Agreement, do not really Sin, I am afraid they are both mistaken themselves, and by their own Authority dangerously mis-lead others. Plainly, if he that comes as an Hostage, is then, or was before, a notorious Offender, or has afterwards falsified his Faith given in weighty Affairs, his Punishment may then be just.

3. Yet the Virtue of *Clelia*, who (i) not of her own accord, but by the Order of her City, went an Hostage, when she escaped by swimming over the *Tyber*, Was esteemed by the *Hetrurian King*, not only safe, but honourable; to use *Livy's* own words in the Affair.

XIX. All
needless
Combats to
be avoided.

XIX. This also is to be added, that all Combats, which are not of use for the deciding of Right, or concluding a War, but merely for vain ostentation of Strength, that is, as the *Greeks* call it, ἐπίδειξις βωμῆς μάλλον ἢ πολεμικῆς ἀγῶνα, Rather a shew of Strength, than a Warlike Action, and wholly repugnant to the Duty of a Christian, and Humanity it self. Therefore all Magistrates ought strictly to forbid these things, for they must render an account for the unnecessary shedding

(i) Not of her own accord.] Compare the History of the Hostages, that shifted off that charge; and were punished for it; in *Nicetas*, B. 2.

ding of Blood to him, whose Vicegerents they are; for in *Sallust* those Generals gain the greatest Honour, who purchase Victory with the least Blood. And *Tacitus* writes of the *Catti*, a People of known Valour, *They made (k) very few Excursions, and fought always upon Advantage.*

C H A P. XII.

Concerning the Spoiling the Country of our Enemies.

I. I. **T**HAT one may destroy the things of another without the Imputation of Injustice, one of these three things should necessarily go before. 1. Either such a Necessity as may be supposed to have been excepted in the Institution of the first Dominion. As when a Man, purely for his own Safety, shall throw the Sword of a Mad-man into a River; yet in that very case he lies under an Obligation to make Satisfaction for it to the full value, *in true honesty*; as I have shewed in another place. 2. Or some Debt arising from an Inequality, that so what is wasted may be reputed, as taken in Satisfaction of that Debt, for otherwise it could not be Lawful. 3. Or some Injury, that may merit such a Punishment, or which such a Punishment does not proportionably exceed. For as a judicious Divine well observes, there is no manner of Justice, that a whole Kingdom should be laid waste, for the driving away of

I. *What Spoil is just, and how far.*

(k) *They made very few Excursions, and fought always upon advantage.* Plutarch blames Demetrius, that he exposed his Soldiers to Dangers, and Battles, more out of a desire of Vain-glory, than for Profit.

of a few Cattle, or the burning of some Houses. Which is also allowed by *Polybius*, who would not have the Rigour of War be exercised without controul, but just so far, that Wrongs and Punishments may be equally ballanced: And for these Reasons, and with these Limitations, it may be done without Injustice.

2. But unless it be for some extraordinary Advantage, it would be very foolish to do another a considerable Damage, without any Profit to ones self. Wherefore wise Men used to be byassed by their Interest, the principal Instances whereof *Onosander* has observed, *Let him destroy, burn, and lay waste his Enemy's Country: (a) For the want of Money and Victuals consequently shorten the War, as Plenty would lengthen it.* To which agrees that of *Proclus*, *It is the Duty of a good General to straiten his Enemies as much as possible.* And thus says *Curtius* of *Darius*, *He expected that he should be overcome by Famine*, having nothing to sustain him, but what he could get by Spoil and Plunder.

3. And that Waste and Desolation must be born, which quickly forces an Enemy to Peace: This way of making Wars did *Halyattes* use against the *Medeſians*, the *Thracians* against the *Byzantians*, the *Romans* against the *Capuans*, *Capenates*, *Spaniards*, *Ligurians*, *Nervians*, and *Menapians*. But if we rightly weigh the matter, such things are for the most part managed rather out of Hatred than wise Counsel: For very often either those inducing Reasons cease, or others prove more prevalent to disswade us.

II. 1. This

(a) *For the want of Money and Victuals shorten the War.*] *Philo* of a Contemplative Life, says, *Enemies use to lay waste and ruin an Enemies Country, that for want of Necessaries the Enemy may more readily yield himself.* The same in *Divis*, *They bring a double Evil upon themselves, Want to their Friends, and Plenty to their Enemies.*

II. 1. This happens first, when we have got Possession of that part of a Country, which may be of great Advantage to us, and be none to the Enemy. To which the divine Law does properly belong, which allows wild Trees and unfruitful to be cut down, to make Fortifications and Engines of War; but those that bear Fruit to be preserved for use, giving the Reason, because Trees, cannot as Men may, rise up in Arms against us. Which (b) Philo, by a Parity of Reason, extends

II. No
wasting of
Things that
may be pro-
fitable to
us, and one
of the En-
emy's Power,

(b) Philo.] There is another Passage of the same Author concerning Humanity, worth the transcribing here. Moses also dispensing his Equity in a more large manner, descending from Rational Creatures, to dumb Animals, and from these to the Products of the Earth; of which we may now say, as we have treated of Men, being the most excellent Creatures, we have also of others that have a sensitive Soul. He therefore expressly forbid cutting down Fruit-Trees, or destroying unripe Corn, or wasting any manner of Fruits, that Mankind might be supplied with plenty of Provisions. And that there might not be only Plenty of Things necessary to humane Life, but also of Dainties, Corn and Grain are necessary Things set apart for the nourishment of Mankind; and all sorts of Things growing on Trees are for Variety and Delicacy; which often upon the failure of the one, happily supply the place thereof, in affording comfortable Nourishment. Moreover he wisely forbid the wasting an Enemy's Country; particularly he forbids the cutting down of Trees, thinking it very unjust, that we should vent our Anger (conceived against Men) upon Things that never did us any hurt. He also thereby teaches us, that we should not only regard the present Time, since nothing continues long in the same State, but that all Things are subject to Change and Alteration; so that they who are now our Enemies, may easily upon Conference and Agreement become our Allies and Confederates. But to deny our Friends Necessaries, is very hard, for whom in respect of future uncertainty we ought to preserve something that may be useful. For it was most truly said of the Ancients, we should so use our Friends, as supposing sometime they may become our Enemies; and so treat Offences, as there may be hopes of Friendship, that is, that every Man should reserve something in his own Breast, whereby he may be Safe; and not so discover himself by his Words or Actions, as afterwards to repent himself of his too much Vehemence, and blame himself, when the Business is past remedy. This is to be observed in all Cities as an Oracle, that in Time of Peace they may provide for War, and in War for Peace. And we should neither too much trust

tends even to fruitful Fields; to which he adds these words. *Why are you angry with things inanimate, particularly those that are mild, and yield grateful Fruit? Do they, like Men, discover any hostile (or disobliging) Intentions against you? Do they deserve to be entirely rooted up, for what they do, or threaten to do against you? but they are very beneficial to the Conqueror, and afford a large plenty of things immediately necessary, and even contribute to our Pleasures; Men do not only pay Tribute, but even Trees, and that of more value in their proper Seasons, and also such as Man cannot live without. And Josephus to the same purpose. If Trees could speak, they would infallibly cry out, and reproach us with Injustice, for making them suffer the Punishment of War, who were no Occasion of it. Of the same Opinion was Pythagoras, in Jamblichus; It is unjust to hurt, or cut down a Tree that bears Fruit.*

2. (c) And Porphyry describing the Manners of the Jews (in his fourth Book of not eating living Creatures) esteeming their Custom to be (I suppose)

our Friends, as though they could never be otherwise, nor so distrust our Enemies, as if they could never become our Friends. But if we can do nothing for an Enemy in hopes of Reconciliation, there is certainly nothing hostile in the produce of the Earth: but all Things are kind; all Things profitable; all Things most gentle, most necessary or friendly; as whose Fruits afford us either Nourishment or something Equivalent to it. We are not to make War upon Things ignorant of War; not to cut down, not to burn, nor utterly root out things, which Nature by the moisture of Waters, and the Summers Heat has nourished up, in order to bring her tribute unto Men, as unto Kings. But there has been care taken of it, as of the common and best Suppers of all things, not only to preserve unhurt the Strength and Vigour of living Creatures, but also of the Produce of the Earth, especially what contributes to Nourishment, because that wants the greater Protection, neither do those things grow as the wild Fruits, but require skilful Management, to make them thrive.

(c. And Porphyry.] They are his Words. The Law also Commands us to spare them, though in a Country that is an Enemy to us and our Allies, so that we may not lawfully cut them down.

pose) the best Interpreter of their Law, enlarges it even to all *Beasts* serviceable to Husbandry, for he says *Moses* was commanded to spare also these in War. But their *Talmud* Writings, and *Hebrew* Interpreters extend it yet farther, declaring (d) that this Law ought to reach to every thing that may be destroyed without Cause, as the burning of Houses, the destroying of *Eatables* and *Drinkables*. The wise Moderation of *Timotheus* the *Athenian* General agreed with this Law, who (as *Polyænus* relates it) would not suffer a House or Village to be destroyed, or a Fruit-tree to be cut down. There is this Law also in *Plato*, in his fifth Book *de Republica*, μήτε γῆν τέμνειν, μήτε οἰκίας ἐκκινεῖν, forbidding to waste Lands or burn Houses.

3. Much less ought it then to be allowed after compleat Victory. *Cicero* blames the destroying of *Corinth*, though they had in a gross manner abused the *Roman* Embassadors. And in another place he calls that War, horrid, wicked, and pitifully malicious, which was made against Walls, Houses, Pillars and Posts. *Livy* much commends the Mercy of the *Romans*, at the taking of *Capua*, that they did not exercise their Cruelty (e) on the Innocent Houses and Walls, by Fire and Sword. *Agamemnon* says in *Seneca*,

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Equi-

(d) That this Law ought to reach.] But against the restraining it, with this Exception added, if these Trees do not in Places near a town hinder the Archers or Darters.

(e) On the Innocent Houses and Walls.] There is a remarkable Letter of *Belisarius* on this Subject to *Totilas*, *Goth.* 3. It was formerly esteemed the Glory of Wise Men, and civilized Nations, to raise noble Structures; and to destroy them after they were built the part of stupid Fools, as not blushing to transmit to Posterity Tokens and Monuments of their mad and frantick Spirit. It is manifest, that Rome the most stately and magnificent City of all the World (or that the Sun beholds), and that it could not arrive to that Greatness and Splendour, the Labour of one single Man, nor in a short time; but many Kings, and

*Equidem fatebor (pace dixisse hoc tua
Argiva tellus liceat) affligi Phrygas
Kinclue volui : ruere, & equari solo
Etiam arcuissem*

'Tis True, the Trojans (and I hope my Country
Forgives my Clemency) I thought to Conquer;
But to apply th' Extremities of War,
Or raze their City, This I ne'er intended.

4. Indeed holy Writ informs us, that some Cities were by God's especial Command entirely razed; even against that general Law, the Trees of the Moabites were ordered to be cut down. But that was not done in hatred to the Enemy, but in just Detestation of their Impieties, which were either publickly notorious, or esteemed so in the sight of God.

III. 1. This

and Emperors, the successive Generations of many noble Men, many Ages, and an infinite Mass of Treasure, had drawn thither, as well as other Things, so also the most curious Artificers in the World. Thus they having by degrees brought so great City to Perfection, have left the Monuments of their Virtue to future Ages. Wherefore to ruin or destroy it, would be injurious to Mankind of all Ages; to rob our Ancestors of the Memory of their just Praise; and future Ages the Pleasure of so glorious a Sight. Since things then are thus, consider that one of these two must certainly happen; either you will be overcome in Battle by the Emperor, or he by you. If you be Conqueror, then by destroying the City, you destroy not what is another's, but your own; and if you preserve it, you will enjoy the most beautiful Possession in the World: On the other side, if you should be vanquished, the preserving the City of Rome will be a great Argument to incline your Conqueror to show Mercy to you, but if it be destroyed your Affairs will be lost beyond any hopes of Mercy. And you will not only get no Advantage from doing it, but will have such a Name from all Mankind, as such a Fate deserves. So it is in your Will, to have Fame make her Report of you for as the Actions of Great Men are, so is their Reputation. See the Law of Frederick 1. in Conrad Abbots of Uispeze, and of Frederick's Own Palatine in Melancthon's Chronicle.

III. 1. This will likewise happen, where the Possession is yet in Dispute, if there be likely hope for a speedy Victory, which may quickly decide it, whose the Lands and Fruits shall be. Thus Alexander the Great, as Justin relates it, forbade his Soldiers from wasting Asia, (f) declaring to them before, that they should spare their own, and not destroy those things, which they came to possess. Thus Quintius, when Philip over-run Thessaly, wasting it with Fire and Sword, encouraged his Soldiers (as Plutarch informs us) to march through the Country, as if it were now entirely their own. Cræsus advising Cyrus not to give up Lydia to be plundered by his Soldiers, tells him, You will not ruin my Cities, nor my Lands, they are no longer mine, they are now become yours, they will destroy what is yours.

III. If there be probable Hope of a speedy Victory.

2. They who do otherwise, may apply to themselves the words of Jocasta to Polynices in Seneca's *Thæbais*.

*Petendo patriam perdis: ut fiat tua,
Vis esse nullam: quin tuæ causæ nocet
Ipsam hoc, quod armis vertis infestis solum
Segetesque adultas sternis, Et totos fugam
Edis per agros: Nemo sic vastat sua
Quæ corripit igne, quæ meti gladio jubet,
Aliena credis.*

P 2

You

(f) Declaring to them, that they should spare their own. Gellimer with the Vandals besieging Carthage, neither drove away Spoil, nor wasted the Country, but took Care of it as his own. Procopius in the beginning of *Vandal.* 2. In *Helmoldus* also B. 1. cap. 66. Is not the Country, which we waste, ours? and the People whom we subdue, our People? Why then do we turn our own Enemies, and destroy our own Contributions? Agreeable to this has *Bembo*, B. 2. and *Parus* in his Book against the Germans, Hist. 6.

You ruin your Country whilst you seek it; to make it yours

*Its Being you destroy; it Defeats your Claim.
To level, thus in Arms, the ripen'd Harvest;
Is Fire and Sword, the Vengeance of an Enemy,
Applied to Spoil and Ravage what's ones own?
No, our deadliest Foes we thus afflict.*

To the same Sense are the Words of *Curtius*, *Whatsoever they wasted, they owned to be their Enemies*. Agreeable herunto are the Reasons, which *Cicero* in his Letter to *Atticus* brings against that Advice of *Pompey*, to induce a Famine upon his own Country. Upon this account *Alexander* blames *Philip* (in the 17th Book of *Polybius*) whose words *Livy* has thus rendred: *Philip dares not engage in a fair Field-fight, nor come to a pitch'd Battle, but flying away burns and plunders Cities, and spoils the Provisions, which should be the Reward of the Conquerors. But the old Kings of Macedon did not use to do so, they used to come to a fair Engagement, to spare Cities as much as possible, that they might have the more wealthy Dominion. For where is the Wisdom to have no other Pretension to a Country, but barely what is left by Chance of War.*

IV. If the
Enemy can
be supplied
otherwise.

IV. 1. This is further allowable, if the Enemy can be supplied elsewhere, either by Sea or Land. *Archidamus* in *Thucydides*, in his Speech to dissuade his Countrymen the *Lacedemonians* from a War with *Athens*, puts this Query, What hope had they to succeed in the War, whether, because they excelled in Number of Soldiers, they pretended to waste the *Athenian* Lands? but consider (says he) they have other Countries under their Dominion, (meaning *Thrace* and *Ionis*) and they might easily supply themselves by Sea, with whatsoever they wanted. Wherefore on that account

count it were best to protect the Husbandmen even to the Enemy's Quarters. Which we have lately practised in the Wars of the Low-Countries, by paying Contributions to both Parties.

2. And this is agreeable to the ancient Custom of the *Indians*, among whom, as (ff) *Diodorus Siculus* relates, *Husbandmen are indemnified equally as the Priests, so that they follow their Labour even close by the Camp, and near the Troops.* And he adds, *They do not burn the Enemies Lands, nor cut down the Trees.* And again, *No Soldier will willingly wrong Husbandmen, but esteeming them as common Benefactors, forbear doing them any manner of Injury.*

3. *Xenophon* informs us, that it was agreed between *Cyrus* and the *Affyrian*, that the *Husbandmen* should enjoy *Peace*, while the *Soldiers* engaged in War. (g) Thus *Timotheus*, as *Polyænus* relates, let out the fruitfulest Lands to *Foreigners*: Nay, (as *Aristotle* adds) sold the very Corn to his *Enemies*, and with that very Money paid his own *Soldiers*. Which *Viriatus* also practised in *Spain*, as *Appian* witnesseth. And this very thing we have seen done in the aforesaid Low-Country War, with great Equity and Profit, to the Admiration of all *Foreigners*.

4. These Customs do the *Canons* propose to our *Christian Imitation*, as being obliged to, and professing more *Humanity* than others; therefore

P 3

they

(ff) *Diodorus Siculus*.] B. 2.

(g) Thus *Timotheus*.] *Plutarch* reports the same of the *Megarians*, *quæst. Græc.* And *Procopius*, *Goth. 3.* of *Totilas* when he besieged *Rome*. He did no manner of Damage to the *Husbandmen* all over *Italy*, but commanded them to follow their *Business*, as they used to do, without fear, so as they paid him their *Contributions*. *Cassiodore*, *l. 5.* This is the greatest Glory of the *Defenders*, if whilst they seem to protect the aforesaid Countries, they do not cease to manure the Lands.

they enjoyn us to put not only the Husbandman beyond the hazard of War, but also their Cattle with which they plow, and their Seed which they carry to the Field; on the same Account the Civil Law forbids to take in Pawn any thing belonging to the Plough. And it was formerly a great Crime among the *Phrygians* and *Cyprians*, afterwards (b) with the *Athenians*; and then the *Romans*, to kill a plowing Ox.

V. If the things be of no use for War.)

V. There are some Things of that Nature, that they can no way contribute either towards the Cause, or maintaining of a War, which things even common Reason will have spared during a War. Like to this is (i) the Request of the *Rhodiaks* to *Demetrius*, who assaulted the City, to spare the Picture of *Jalyfus*, translated by *A. Gellius*. *What reason can you have to desire to destroy so excellent a Piece, by burning it in the House? for if you vanquish us, and take the City, this Picture will also be entirely your own; but if you cannot by Siege carry us, pray consider, what a disgrace it will be to you, because you could not overcome the Rhodians, you must needs make War with Protogenes being dead.* *Polybius* called it an Act of the extreamest Madness to destroy those Things, which by being destroyed do not weaken the Enemy, nor advantage the Destroyer. Such are Temples, Porches, Statues, and the like. *Cicero* much commends *Marcellus*, because he took such a particular care to preserve all

(b) *With the Athenians, and then the Romans.* Also in *Peloponnesus Varro de re rust.* *Columella* in the beginning of B. 6. Add to these *Pliny* 8. 45. *Ælianus de Hist. Animal.* 2. cap. the last. *Phrygy*, 2. *De Abst.* *Vegetius* 3. *de Arte veter.*

(i) *The Request of the Rhodians to Demetrius.* See *Pliny* upon this Subject, *Hist. Nat.* 8. 38. and 35. 10. and *Plutarch* in the *Life of Demetrius*; we have the same Sense in *Belisarius's Letter*, which we have lately mentioned.

the Buildings of Syracuse both publick and private, as if he had been sent with an Army, rather to defend than take the City. And the same Author again, Our Ancestors used to leave to the Conquered, what Things were grateful to them, but to us of no great use.

VI.1. But as this may very well prevail for other publick Ornaments, for the Reasons aforesaid, so it may be more especially for Things dedicated to sacred Uses, for, although these also (as we have said elsewhere) are in some sort Publick, and therefore by the Law of Nations not excused from Military Execution, yet if no Danger can arise from the preserving of such Buildings, and their Appurtenances, (k) the Reverence due to Holy Things may be a sufficient Plea, especially with those who really worship the same God, tho' they may differ in Opinions and Ceremonies.

VI. This especially ought to take in Things Sacred, or thereto belonging.

P 4

Thucy-

(k) The Reverence due to Holy things may be a sufficient Plea.] Polybius in Excerpt. Pieres. Because you are angry with Men, so not therefore profanely against the Gods, is the Token of a most extravagant folly. And truly with Reason. For SENECA replied, it were better, that God be worshipped there in any sort whatever, than that it should be bestowed on Victuallers, as it is in Lampridius. Hannibal spared the Temple of Diana Saguntina out of Reverence, says Pliny. Nat. Hist. 16. 2. Though Foreigners, we do not rob our Enemies of their Temples. Appian. Civil. 2. The Latin Writer of the Life of Agesilaus, says, Neither did he only praise it in Greece, to revere the Temples of the Gods as sacred, but also among the Barbarians, he preserved the Images and Altars, with the highest Veneration. Therefore he said, he wondered that those were not reputed Sacrilegious, who hurt their Temples, or that they were not more grievously punished, who lessened Religion, than they who plundered Temples. See also Plutarch of this Devotion of Agesilaus. He also commends many Romans, for this very thing in the Life of Sylla; some called to mind Flaminius, others Manius Aquilius, and Aemilius Paulus; one whereof having drove Antiochus out of Greece, and the two other conquered the Kings of Macedon, did not only spare the Grecian Temples, but enriched them with Presents, and revered them with great Honour and Devotion. See also

Thucydides says, it was a Law observed by the *Greeks* in his Days, ἰόντας ἐπὶ τοῖς ἀλλήλων, ἱερῶν καὶ ἐνόντων ἀπέχεσθαι, *When they invaded one another in a hostile manner, they mutually spared holy Places.* When *Alba* was destroyed by the *Romans*, *Livy* says the *Temples* were preserved. And *Silius* in his 13th Book thus writes of the *Romans* taking *Capua*.

*Ecce repens tacito percurrit pectora sensu
Religio, & Sævas componit Numine mentes,
Ne flammam tædæque velint, ne templa sub uno
In cinerem sedisse rogo.*

*Religion, by insensible Degrees
Steals on the Mind, and soothes the Breasts of Con-
querors,
Lest in the Universal Wrack of Cities,
The Temples of the Gods fall undistinguish'd.*

The same *Livy* tells us, it was objected to *Q. Fulvius* the Censor, That he had involved the People of *Rome* in the Crime of *Sacrilege*, by the Destruction of *Temples*, as if the *Immortal Gods* were not the same in all Places, but that they of one place should be honoured,

also *Vitruvius*, B. 2 Deonem. 42. *Plutarch* in the Life of *Caesar* Brutus 5. *Miscellan*. *Capao* himself a Moor, not a Christian, would have Honour paid to the *Christian Churches*, which the *Vandals* did not, for which he hoped that the God of the *Christians* (whosoever he were) would be provoked against them. This we have in *Procopius Vandal*, 1. who also in *Persic*, 2. says, that *Chosroes* the *Persian*, though not a *Christian*, spared the Churches of the *Christians* at *Antioch*. *Justinian* also, as the same Author relates, *Vandal*, 2. durst not retain to himself those Things, which *Vespasian* had (long before) brought from the Temple of *Jerusalem* to *Rome*, and *Gizariach* having found them at *Rome*, transported them into *Africk*. Of the Reverence paid by the *Mahometans*, to the place where the Bones of *Ezekiel*, and the three Companions of *Daniel* were buried, *Benjamin* the Jew testifies it in his *Itinerary*.

honoured, and adorned with the Spoils of those of another. Strabo writes, that the Tectosages, who with others had robbed the Temple of Delphos, to appease the injured God, did consecrate those Spoils, with some Addition, to their Gods at home.

3. To come now to the Christians. Agathias relates, that the Franks spared the Temples, as being themselves of the same Religion with the Greeks. Nay it was customary to save the Persons of Men in respect to Churches, which (not to quote Examples of Heathen Nations, whereof there are many, for Writers call this Custom, *κοινὰ τῶν Ἑλλήνων νόμιμα*, The common Practice of the Grecians) Augustine thus commends (l) in the Goths, when they took Rome. The (m) Churches consecrated to (the Memory of) Martyrs and Apostles, in that general Devastation, secured all those that fled to them for Refuge, whether Natives or Foreigners. So far the Rage of the Enemy might extend without controul, but here the Fury of Slaughter stopt; to these Places did the Compassionate Soldiers convey their Prisoners, which they had taken without the bounds of these Sanctuaries, from the Fury of their own Companions, that had less Tenderness than themselves; and they who otherways were inhumanly Cruel, (o) as soon as ever they came near any of those Places, where

(l) In the Goths when they took Rome.] Under Alarick the Arrian, in whom this Action was remarkable. says Cassidore. 12, 20. When Alarick had taken the Vessels of the Church of St. Peter, from some of his Soldiers that had plundered them, being afterwards inform'd thereof, he commanded them to be restored to the same Place by the same Persons that took them; that Covetousness, which had occasioned this Sin of Sacrilege might expiate the Crime with a large Addition.

(m) Churches consecrated to the Memory of Martyrs, witness this.] Isidore has writ this Passage. Chron. Goth. Era. 447.

(o) As soon as ever they came near any of those Places.] The Goths besieging Rome under King Vitiges, spared the Monuments of the Apostles, witness Procopius, Goth. 2. Even the Barbarians, and not the Christians,

where they were forbid to make use of their Right of War, immediately all Military Execution ceased, and bloody Barbarities were at an end.

VII. Also
Religious
Things.

VII. 1. What I have said of Sacred things, the some may also be allowed of things that are Religious, even of those that have been erected in Honour of the Dead. For even those (tho' the Law of Nations hath not exempted them from the Fury of the Conqueror) cannot be violated without breach of common Humanity. The Lawyers maintain that to be the highest Reason, which promotes Religion. There is a pious Saying of *Euripides* in his *Troas*, in behalf of Religious things, as well as Sacred,

Μῶρ' ὃ Σινητῶν ὅσις ἐκπορθῆ πόλεις
Ναὺς τε τύμβους τ' ἱερὰ καὶ κεκληρότων.
Ἐρημία δ' οὖς αὐτοῖς ὦλεθ' ὕστερον.

*Whoever Ravages the silent Dead,
Or impiously profanes their Sacred Urns,
Unwise I'll call him; for he ne'er reflects,
That his own Dust may once be so disturb'd.*

Apollonius Tyaneus (p) thus interpreted the Fable of the Giants fighting against Heaven, ὑβρίσαι εἰς τοὺς νεῶς αὐτῶν, καὶ τὰ ἱεῖα, *That they violated the Temples and Habitations of the Gods.* *Hannibal* is called Sacrilegious by *Statius*, for burning the Altars of the Gods.

2. *Scipio*

Christians, had the Benefit of flying to those Places for Refuge. See *Zosimus*, B. 4. of the barbarous *Tornitani*. Add the *Helvetique Law* in *Simler*, *Nicetas* in the *Life of Alexius Son of Manuel*; the same Author also, B. 1. of *Andronicus*, where he blames the *Sicilians* for violating the Churches of the *Antiochians*.

(p) Thus interpreted the Fable of the Giants fighting against Heaven] As *Diodorus Siculus* does another of *Epopæus*.

2. *Scipio*, at the taking of *Carthage*, presented his Soldiers with large Donatives, *χωρεῖς τῆς τοῦ Ἀπόλλωνος ἀναπλοῦσιν*, says *Appian*, except those who had assaulted the Temple of *Apollo*. The Trophy erected by *Mithridates*, *Cæsar* (as *Dion* relates) durst not Demolish, as Consecrated to the Gods of War. *Marcus Marcellus* (as *Cicero* observes in his fourth Oration against *Verres*) would not out of Conscience touch those things which Victory had rendered Profane. And the same Author adds, that there were some Enemies, who in War observed the Right of Religion, and of Customs. And he in another place condemns the War of *Brennus* against the Temple of *Apollo*, as directly impious. *Livy* calls the Action of *Pyrrhus* in Plundering the Treasure of *Proserpina*, abominable, and presumptuous against the Gods. So does *Diodorus* that of *Himilco*, ἀσέβειαν, καὶ εἰς θεῶν ἀναπλοῦσιν, Impious, and sinful against the Gods. The same *Livy* terms the War of *Philip* Prophanic, as it were made against both the Cælestial and Infernal Deities; nay, he calls it Madness and Impiety. And *Florus* on the same, (q) *Philip*, contrary to the Right of Victory, vented his Cruelty on the Temples, Altars, and even the Sepulchres of the Dead. *Polybius* speaking of the same, passes this Judgment, Who can call it any thing else but an Act of downright Madness, impiously to destroy those things which can be of no Advantage to us, nor Prejudice to our Enemies, particularly Temples, Images, and such like Ornaments? And here he doth not permit the Law of Retaliation.

VIII. 1. Tho'

(q) *Philip*, contrary to the Right of Victory, vented his Cruelty on the Temples, Altars, and even the Sepulchres. *Polybius* detested the like Act of *Prusias*, whose words *Suidas* has preserved in *Vocal Prusia & Excerpt. Peires*.

VIII. The
Advantages
mentioned,
which
arise from
this Moder-
ation.

VIII. 1. Tho it be not properly my design to enquire, what is now most practised, but to reduce the extravagant Licence of making War to what natural Equity allows, or what is best among things Lawful; yet Virtue it self, little esteemed in this Age, ought to forgive me, if, whilst she is by her self neglected, I set a value upon her on the account of her Advantages. First then, Moderation observed in preserving those things which do not lengthen out the War, takes from the Enemy a powerful Weapon, Desperation. *Archidamus* thus speaks in *Thucydides*, Look upon the Enemy's Country as an Hostage, and so much the better the more it is enriched, and with the more reason to be spared, lest Despair should render the Enemy more Formidable. (r) The same was the Advice of *Agefilaus*, when against the Opinion of the *Acheans*, he gave the *Atarnanians* free liberty to sow their Corn, saying, the more they sowed, the more desirous they would be of Peace. And to this purpose in the Satyr,

Spoliatis arma super sunt.

The Plunder'd still have desperate Arms.

Livy tells us, when the *Gauls* had taken a City, their chief Commanders would not let all the Houses be burnt; that what they left standing of the Town, the Enemies might look on it as a particular Favour, and thereby it might be a means to make them more easie.

2. Besides, the sparing of an Enemies Country during a War, looks as if we were pretty confident

(r) The same was the Advice of *Agefilaus*.] *Plutarch* mentions it also in the Life of *Agefilaus*.

dent of a compleat Victory. And Clemency is of it self a proper Instrument to soften and pacifie the Minds of Men. *Hannibal* (according to *Livy*) wasted none of the Lands of the *Tarentines*, but not of Modesty, either in General, or Soldiers, but to gain the *Tarentines* to his Party. For the same Reason did *Augustus Cæsar* forbear Plundering *Pannonia*. *Dio* gives the Reason, He hoped to win them without Blows. And *Timotheus* upon the same account, (as *Polyænus* relates) and for some other Considerations, gained upon the Affections of his Enemies. *Plutarch* mentioning the Moderation (s) of *Quintius*, and the Romans that were with him (in Greece) adds this, They quickly reaped the benefit of this forbearance, for as soon as he came into *Thessaly*, the Cities readily yielded to him. The Greeks also which dwelt within the *Thermopylæ*, earnestly desired his coming; and the *Achæans* renouncing the Friendship of *Philip*, immediately Confederated with the Romans against him. *Frontinus* informs us, that a City of the *Lingones* having escaped a fearful Devastation in the War made by *Domitian*, under the Conduct of *Cerealis*, against *Civilis* the *Batavian*, and his Associates; because beyond their expectation, they had lost nothing of their Goods, submitting to his Obedience, they furnished him with 70000 Men well armed.

3. Contrary Counsels have met with contrary Success. *Livy* gives an Instance in *Hannibal*, By Nature much inclined to Covetousness and Cruelty, to destroy what he could not keep, that he might leave nothing to the Enemy but wasted Lands. And this Counsel was wretched both in the Cause and the Effect. For he not only lost the Affections of those whom he thus barbarously used, but of others also; for

(s) Of *Quintius*.] viz. To *Quintius Flaminius*.

for the Terror of the Example reached beyond the immediate Sufferers.

4. I readily agree to what has been observed by some Divines, that it is the Duty of supreme Powers, and of Commanders who desire to be thought *Christians* by God and Man, to prevent the merciless plundering of Towns, and the like Calamities, as cannot be done without infinite Loss to multitudes of innocent People, and be but of little Advantage to the Conqueror in his War; for Christian Charity, as well as Justice it self, perfectly abhor them. There is certainly a greater Bond among Christians, than there was formerly among the *Grecians*, in whose Wars it was Enacted by a Decree of the *Amphictiones*, that no *Grecian* City should be entirely destroyed. And some ancient Writers affirm, that *Alexander* the *Macedonian* repented of nothing more, than his destroying of *Thebes*.

C H A P. XIII.

Moderation about things taken in War.

I. That the Goods of the Enemies Subjects taken in War, are to be detained by way of Debt.

I. 1. **B**UT the taking away of our Enemies Goods in a just War, is not to be reputed wholly innocent, or clear from the Obligation of Restitution. For (a) if we respect that which is done rightly, it is not really lawful to take, or keep from the Enemy more than may be justly due from him, except what things (beyond the same due) we are obliged to detain for our own necessary Security; but when the Danger is over,

(a) If we respect that which is done rightly.] See the Opinion of Innocent the Pope of Rome in Summa 1.

over, they are also to be restored, either in kind, or to the full value; as we have already declared in the II^d Book, Chap. II. For what we may lawfully do with the Goods of those that are at Peace with us, we may do it much more to those of our Enemy. This then is a sort of Right to take, without a Right of possessing.

2. But since a Debt may arise to us, either from the Inequality of Things, (b) or by way of Punishment, we may on either of these accounts seize on the Goods of the Enemy, but with a difference; for as we said before, that from that former Obligation, not only the Goods of the immediate Debtor, but also those of his Subjects by the allowed Law of Nations (as by way of Suretyship) stand engaged; which Law of Nations we look upon to be of another kind, than that which consists in a bare impunity, or the awe of external Judgments. For as in our private Affairs, by our own personal Consent, our Dealer does not only desire an external Right, but also an internal one: So also by a certain general Consent, (is he) who by a certain Power comprehends in himself, the consent of each Individual. In which Sense the Law is called *πὸ δυνάμει συνθήκη κοινὴ*, *The common Agreement of the City*. And it is highly probable, that it was pleasing to the Nations, that in such a Case, such a Right might be allowed, because this Law of Nations was intended, not only to prevent greater Mischiefs, but also to enable every Person to recover his own Right.

II. But if the Prince his Debt be general, I do not see that by the consent of Nations, such a Right

II. But not for the Punishment of another Man's Crime.

(b) Or by way of Punishment.] The Romans ordered Prusias to make Satisfaction to Attalus, and moreover to pay him a Penalty.

Right is allowed on his Subjects Goods. For such an Obligation upon another Man's Goods is odious, and therefore not to be extended farther than to the Offender himself. Neither does the like Advantage arise from these latter Debts, as from the former. For the former has relation to Goods, but the latter not; and therefore the Prosecution of it, may, without any damage, be omitted. Neither does what I have already mentioned of the *Atric* Law at all contradict it: For in that Case Men stood engaged not strictly to prevent the Cities being punished, but only to force the City to do what it ought to do; that is, to punish the Guilty: Which Debt has relation to the former Duty, not in any wise to the latter. For it is one thing to be obliged by Duty to punish, and another thing to be liable to Punishment for the neglect of that Duty. Tho' this rises to be the Consequence of that Omission; but yet so, that the former is the distinct cause, the latter the effect. Therefore the Goods of the Enemies Subjects cannot be possessed under the Notion of Punishment, but only those of Offenders, among whom are included the Magistrates themselves, that do not (according to their Duty) punish Offences.

III. By
Debt is here
understood
the conse-
quent
Charges in
War. Ex-
amples.

III. Moreover, the Goods of an Enemies Subjects may be taken and possess'd, not only to reimburse our selves of the Primary Debt, which was the occasion of the War; but also to make Satisfaction for the subsequent Charges, according to what we have said in the beginning of this Book. And thus we must understand what some Divines have written, that things taken in War are not to be equalled with the Principal Debt. For this is to be understood, till, according to sound Judgment, Satisfaction be made for the Damage done in that War. Thus in the Treaty with *Antiochus*, the *Romans* (as *Livy* relates) judged it equitable, that the King

King (c) should bear the Charges of the War, who had been the Occasion of it. So *Justin, The Author of the War* ought by the Law of Arms to bear the Charges of it. The *Samians* are condemned in *Thucydides*, χρηματα τὰ ἀναλωθέντα ἀποδέναι, To bear the Charges of the War. And so often in other places; but whatsoever is justly imposed on the Conquered, may justly be exacted by force of Arms.

IV. 1. But we must observe, which we have elsewhere mentioned, that the Rules of Charity reach farther than those of Justice. He that abounds in Wealth is guilty of gross Inhumanity, if he strip his poor Debtor of all that ever he is worth, by the Rigour of the Law, to satisfy his own Debt; but more particularly, if that Debtor contracted that Debt by his Kindness to another; as if he had engaged for his Friend, but had received none of the Money to his own proper Use. (d) *Very miserable is the Condition of a Security*, says *Quintilian the Father*. Yet such a hard-hearted Creditor acts nothing against the strict Letter of the Law.

VI. Humanity bids us not use this Right to the utmost.

2. Wherefore (e) Humanity requires us to spare the Goods of those who are in no fault concerning
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(c) *Should bear the Charges of the War.*] *Polybius* mentions it *Excerpt. Legat. 23*. So were the *Asiatics* adjudged by *Sylla*, as *Appian* tells us in his *Mithridatics*. The King of *Poland* alledges this Custom in his own behalf, in *Thuanus*, B. 73. in the Year 1581. So in *Homer's Iliad* I (3) the *Scholiast* expounds the word τριπλὴν, the Rate of the War, viz. half of the things that were in the City.

(d) *Very miserable* (says *Quintilian the Father*) is the Condition of a Security.] He adds, the Creditor cannot for Shame sue the Surety, unless the Principal prove Insolvent. Well said for Shame, for he seems to say, that the Sureties have a certain δυσωπία, Shame, or Modesty, as *Cicero* says on *Atticus*, 16, 15.

(e) *Humanity requires us.*] *Ptolemy* sent back to *Demetrius*, Son of *Antigonus*, his Tent, and all things thereunto belonging, and his Goods,

the War, (who are no otherwise concerned than by way of Suretyship) which we may better be without, than they; but especially if it appear, that they shall receive no Reparation for them from their own (Prince or) City. Agreeably to this, said *Cyrus* to his Soldiers at the taking of *Babylon*, *What ye get (from your Enemies) is justly your own, but if you leave them any thing, it will be an Act of Humanity.*

3. This is also to be observed, since this Right of seizing the Goods of Innocent Subjects, is but Subsidiary (or by way of Suretyship) as long as there are any Hopes of recovering our own from the principal Debtor; or from those, who by not returning our Right, have voluntarily entitled themselves to that of Debtors, to prosecute those who are wholly Innocent, tho' it does not contradict the Rules of strict Justice, yet it is far distant from the Rule of Humanity.

4. Examples of this Humanity are very frequent in History, especially the *Roman*; as when upon Conquering the Enemy, their Lands were returned to them, upon this Condition, that they should from thenceforth hold of the conquered City. Or when a small part of those Lands, were for Honours sake (f) left to the Ancient Possessors. Thus *Livy* tells us, that the *Veii* were punished by *Romulus* with the Loss of part of their Lands. So *Alexander* the *Macedonian* restored their Lands to the

Goods, and also the Monies which he had taken, saying, that they fought not for those common things, but for Empire and Glory. *Plutarch* records it in the Life of *Demetrius*. See also the Action of *Sancho* King of *Navarre*, in *Mariana*, B. 11. Cap. 16.

(f) Were left to the Ancient Possessors.] *Appian* Civil. 2. The Ancient Romans did not take away all the Lands from the Conquered Enemies, but divided them with them. So Histories inform us, that the *Vandals* did thus in *Africk*, and the *Goths* in *Italy*.

the *Unit* under a Tribute. Thus we often read that conquered Cities were not destroyed. And we said before, that not only the Persons, but also the Goods of Husbandmen, were by the Injunction of the Canon honourably spared, with a Tribute laid upon them; and a Liberty of Trade was allowed to Merchants, upon their paying Custom for their Commodities.

C H A P. XIV.

Of Moderation concerning Captives.

I. I. **I**N what places the taking of Men Prisoners, and making them Slaves, is yet allowed, if we respect Internal Justice, it is to be thus limited; that is, it may be so far Lawful, till Satisfaction be made for the first Debt, and its consequent Charges; unless it should happen, that the Persons taken be guilty of such Crimes, as may justly forfeit their Liberty. Hitherto therefore, and no further, he that wages a Just War, has a Right on the Subjects of his Enemy taken Prisoners, and a Power to transfer it firmly to others.

2. But we are taught by Equity and Religion to put the like Differences, as before observed, when we treated concerning killing our Enemies. *Demosthenes* in his Epistle for *Lycurgus* his Children, highly commends *Philip* of *Macedon*, because (a) that he did not make all that were found among his Enemies Slaves: *For he did not think to use all*

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alike

I. Moderation concerning Captives.

(a) That he did not make all that were found among the Enemies Slaves. His Son *Alexander* having taken *Thebes*, set at Liberty both the Priests, and all those who had not given their Consent to the Decrees made against him. *As Phalaris* relates in his Life.

alike, either just, or honest; but duly weighing the Merits of each Person, he acted rather the Judge (than Conqueror).

II. What
may be done
to Slaves by
the Right of
Internal
Justice.

II. 1. But first we must observe, that the Right which arises, as it were, by way of Suretyship for a City, is not of so large an Extent, as that which is derived from the Personal Offences of those that are made Slaves by way of Punishment. Whereupon a certain *Spartan* (b) said he was a Prisoner, but not a Slave. For if we rightly consider the thing, this general Right upon Prisoners in a just War, is much like that which a Lord hath over those Servants, who by reason of Poverty have sold themselves to him; excepting, that the Case of those is far more deplorable, who are brought into this Condition, not by their own proper Crime, but by that of their Governors, *δ' εὐνοῖα δ' οὐρανόθεν γένεατο*, It is a dreadful thing (says *Iso-crates*) to be made a Slave by the Right of War.

2. This Bondage then is a perpetual Obligation to all sorts of Labour, for a perpetual Maintenance. *Chrysippus* his Definition does very well agree with this sort of Slaves, *A Slave is a perpetual Hireling*. And the Law of the *Hebrews* does directly make him a Hireling, who compelled by Necessity, has sold himself for a Slave, *Deut. xv. 12, &c.* and will have his Ransom paid by his Labour, just as the Fruits of Lands Sold or Mortgaged,

(b) Said he was a Prisoner, not a Slave.] Philo says, That often Parents have paid the Ransom for their Children, and Children for their Parents. either violently taken by Pirates, or in the Wars; whom the Laws of Nature, more prevalent than any Human Law, declare free. Just as *Helena* speaks in *Theodectes*,

Θεὸν ἀπ' ἀμφοῖν, &c.

Deriv'd on both sides from th' Immortal Gods,
Who says she should be deem'd to Servitude?

gaged, shall redeem it for the Ancient Owner, Lev. xxv.

3. There is then a vast Difference between what may be done to a Slave by the Law of Nations, and what by Natural Reason. As we have it in the afore-quoted place of Seneca, *Tho' it be lawful to do any thing to a Slave, there is something which the Common Law of Nature forbids to be done to the Man.* So in Philemon,

Κὰν δ' ἄλλ' ἢ νυ τις εἰς τὸν ἄνθρωπον, δέσποτα
"Αἰδέσθωτο εἰς τὸν ἄνθρωπον ὡς ἄνθρωπον."

*What tho' in Servitude, my Master,
He is still a Man as much as ever.*

So Seneca in another place, *Are they Slaves? Yet they are Men. Are they Slaves? Yea, our Companions. Are they Slaves? Yea, our Friends, as Men. Are they Slaves? Yes, Fellow Slaves.* And what we read in Macrobius has the same Meaning with that of St. Paul, *Masters render to your Servants what is Just and Right, knowing that you your selves have a Master in Heaven.* And in another place he advises Masters not to terrifie them with Threatnings, for the same Reason before mentioned; *because we have also a Master in Heaven, with whom is no respect of Persons.* In the Constitutions attributed to Clemens Romanus, we are advised, *Be not too (c) severe to thy Man, or Maid Servant.* Clemens Alexandrinus would have us use our Servants as our second selves, being Men, as well as we; in

Q 3

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(c) Too severe to thy Man.] So also in the Epistle of St. Barnabas, *Do not rule severely over thy Man, or Maid Servant, that believes in Christ, lest thereby you declare that you do not fear him, who is the common Lord, both of you and them.*

imitation of that wise Hebrew, εἰ ὅστι σοι δικάτης, ἄγε αὐτὸν ὡς ἀδελφόν, ὡς ἡ ψυχὴ σε, *If thou hast a Servant, use him as a Brother, for he is such a one as thy self.*

III. It is
not lawful
to kill an
Innocent.

III. Suppose then, that a Lord has the Power of Life and Death over his Slave, in order to maintain his Authority at home; but yet that Power is to be managed with the same Moderation, as do the Publick Magistrates. This was (d) Seneca's Meaning, when he said, *In thy Bondman consider, not what thou mayst inflict on him by the Rigour of the Law, but what thou mayst do in Equity and Conscience, which requires that we should be merciful to our Captives, and purchased Slaves.* And in another place he says, *What Difference is there, what Government one is under, if he be under a Supreme?* In which place he compares the Subject with the Slave, and says, tho' they be under different Titles, yet the Authority over them is the same; which is certainly very true in this Particular, of taking away the Life of either. And again, the same Seneca, *Our Ancestors reputed every Family a little Commonwealth.* Also Pliny, *A Man's House is a certain Republick, and as a City to his Servants.* And Plutarch tells us, that Cato the Censor would not punish any of his Servants; no not for the most heinous Offences, unless he were found Guilty by his own Fellow Servants. To which agree the Words of Job, Chap. xxxi. Vers. 13. and so on.

IV. Not
to punish
unmerci-
fully.

IV. But as to lesser Punishments, viz. Blows, &c. Equity, and also Clemency is to be shewed to Servants, (e) *Thou shalt not oppress him,*

nor

(d) Seneca.] Epistle, 47.

(e) *Thou shalt not oppress him, nor rule over him with rigour.*] See Moses in the Precepts relating to Korzi, 147. 175. 178, and the Com.

nor rule over him with rigour, says the Divine Law concerning a Hebrew Servant, Lev. xxv. which in respect of our Affinity, should now extend to all Servants, Deut. xv. 12, &c. On which place thus (f) Philo, Servants indeed, as to Fortune, are Inferiors, but as to Nature equal with their Masters; but the Rule of Divine Justice is, not what is agreeable to Fortune, but Nature. Wherefore Masters ought not to use Power Tyrannically over Servants, nor to grow Proud, Insolent, and barbarously Cruel; for these are signs of a turbulent and uneasie Spirit, and savour too much of the domineering Tyrant over his Subjects. Seneca puts the Question, Is it equitable to exercise a more severe and cruel Authority over a Man, than is generally done over Beasts? but a skilful Manager that designs to break a Horse, does not pretend to do it by frequent Blows, for he will be fearful and headstrong, if he be not gently handled. And again, the same Author, What can be more foolish, than to practise that brutish Cruelty upon a Man (that is our Slave) which we should be ashamed to do to Cattle,

Q 4

or

Comparison of the Mosaiical Laws with the Roman, Tit. 3. Priscus in Excerpt. Legat. where he prefers the Romans to the Barbarians. The Romans treat their Slaves much better, and as the Fathers or Tutors to them, for that they may withdraw them from those things, which by their Customs are unlawful, when they offend they correct them, as Children; but they repute it unlawful to kill them (as the Scythians do.) There are also several kinds of Liberty allowed them by their Lords, and that not only in their Lives, but also at their Deaths; for whatsoever they appoint concerning what is their own at their Death, it has the force of a Law. Add the Law of the Visigoths, B. 6. Tit. 1. c. 12.

(f) Philo.] Of Special Laws 2. St. Cyprian to Demetrian, If you are not served according to your Pleasure, if not obeyed according to your Will, presently growing Imperious and Severe. you scourge and beat (your Slave) you punish him with Hunger, with Thirst, with Nakedness, and often with the Sword, or Prison; and poor Wretch at the same time you do not think of the Lord your God, when you your self shew such Tyranny to a Man,

or Dogs? On which account the *Hebrew Law* ordered the Master to let his Bond-Man, or Bond-Woman go free, (g) *not only for the loss of an Eye, but even if he had struck out a Tooth*, *Exod. xxi. 26, 27.*

V. Not to
lay too hard
Labour up-
on them.

V. 1. (b) But we are to enjoin them Labour with Moderation, having a respect to their Strength and Constitution. To which, among other things, the *Hebrew Law* pointed in the Institution of the Sabbath, viz. that All might have some Rest from their Labours, *Exod. c. xx. v. 10. c. xxiii. v. 12. Deut. c. v. v. 14.* And the Epistle of C. Pliny to Paulinus begins thus, *I see how gently you treat your Servants, wherefore I will more freely confess to you with what tenderness I use mine; always remembering that Expression of Homer, ἐν γένει πατρίων ὡς ἢ πατρὶς, the Father-in-Law always acted the kind Father, and this our Pater-familias, the Father of a Family.*

2. Seneca makes use of the same word, taking notice of the Humanity of the Ancients, *Do you not observe how careful our Forefathers were to prevent all occasion of Envy to Masters, and Reproach to Servants? When they called the Lord Pater-Familias,*
The

(g) *Not only for the loss of an Eye, but if he had struck out a Tooth* Philo on the aforesaid place, So he (the Master) will suffer a double Punishment by his fault, the loss of his Servant's Labour and Ransom, to which we may add also a third more grievous than the other two, viz. that he is compelled in the greatest Concerns to do good to a Man whom he hates, and whom he wisht it might always be in his Power to torment; and the other for the Damage he has suffered shall receive double Comfort; not only that he obtains his Liberty, but also that he is freed from so severe and cruel a Master.

(b) *We are to enjoin them Labour with Moderation.* See Cap. 14. in the Bishop's Letter to King Lewis, inserted in the Capitular of Charles the Bald. Seneca, Epistle 27. *We do not use them like Men, but as if they were Beasts.* See Xenophon de Rep. Atheniens. of the Mildness of the Athenians to their Slaves.

The Father of the Family. And his (i) Servants Familiars, his Familiars. Dion Prusæensis describing a good King says, He is so far from atting the Lord over his Subjects, that he will not easily allow it over Slaves. (k) Ulysses declares in Homer, That those Servants whom he found faithful should be as dear to him, as the Brothers of his Son Telemachus. And in Tertullian, (l) The Name of Piety is more glorious, than that of Power, and to be called the Father, than the Lord of a Family. And Hierom, or Paulinus thus speaks to Celantia, So govern and order your Family, that you may seem desirous to be accounted, rather the Mother than the Mistress, and engage your Servants to respect you, rather by Kindness than Severity. And St. Augustine makes this Observation, Good Parents formerly so managed their Families, that as to Temporal things the Children had the Advantage of the Servants; but as to Affairs of Religion, there was no distinction, but they had all equal Opportunities of Divine Worship. Whence it came to pass, that every Master was called Pater Familias, which in time became

(i) His Servants, Familiars.] Epicurus his Friends, Seneca Epist. 107i

(k) Ulysses.] Whose Fatherly Kindness to him Eumeus extols, Odyss. ̄. 14.

(l) The Name of Piety is more glorious than that of Power.] St. Cyprian also observes, Testim. 3. to Quirinus, Masters ought to be more kind to Servants that are Believers; and proves it from the Words of St. Paul the Apostle to the Ephesians. Lactantius, B. 5. Cap. 19. Neither do we for any other Reason call each other Brethren but that we believe our selves to be equal; for since we measure all Human things, not by their Bodies, but their Spirits, tho' the Condition of the Bodies be divers, yet they are not Servants to us; but we both esteem them, and call them in Spirit Brethren, Fellow-Servants in Religion. St. Austin concerning the Customs of the Catholick Church. Thou (i. e. the Church) teachest Servants to keep close to their Masters, not so much from the Necessity of their Condition as their delight in their Duty. Thou makest Masters to be gentle to their Servants in respect of the Great God, who is supreme and common Lord of all, and to be more inclinable to advise than to force them. Add Isidore Belus, B. 1. Epist. 47 i. Repeat what we have lately brought out of Priscus.

became so Customary, that even severe Masters affected that Title. But they who are true Fathers of Families do take the same care of their whole Family, both as to Sacred and Secular Things, as of their own Children.

3. The same Piety Servius observes to be in the word *Children*, by which they meant *Servants*, in his Remark upon that of *Virgil*,

Claudite jam rivos Pueri.

And thus did the *Heracleans* call their *Servants Mariandyni*, (m) *δωροφόρος*, *Carriers of Presents*; ἀπαυσις τὸ πικρὸν τῆς περσωνορίας, *abating the harshness of the Name*, as *Callistratus*, an old Interpreter, observed in *Aristophanes*. *Tacitus* commends the *Germans*, who treated their *Servants* like *Husbandmen*. And *Theano* in an *Epistle* says, *The right using of Servants is not to over-work with hard Labour, nor enfeeble them for want of necessary Sustainance.*

VI. The Stock of the Servant, how far the Lord's, and how far his own.

VI. 1. As I said before, we are obliged to maintain our *Servants* for their *Work*. *Cicero* says, *They are not bad Masters who use their Servants like Mercenaries, by making them do their work, and paying them their Wages.* And in *Aristotle*, *A Servant's Wages is his Maintenance.* And *Cato* advises, *Provide carefully for your Family, that it be not starved with Cold or Hunger.* There is something (says (n) *Seneca*) (o) *That a Master owes to his Servant, viz. Food*

(m) *Carriers of Presents.*] *Athenaus*, 6. 18.

(o) *That a Master owes to his Servants, viz. Food and Raiment.*] *Siracides* 23. 25. *Bread, Instruction, and Labour for a Servant.*

(n) *Seneca.*] The same of *Tranquility*, a *Family* requires *Food and Raiment*. The *Romans* plead to *Bessus* in *Procopius*, *Goth.* 3. *Give us at least Food as we are your Slaves, I do not say as much as may suffice*

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Food and Raiment. Donatus writes, that Servants were allowed four Bushels of Corn every Month. And *Martianus* the Lawyer informs us, that a Master is obliged to provide his Servant Cloaths, and the like. (p) The *Sicilians* are blamed in all Histories for cruelly starving the *Athenian* Prisoners.

2. *Seneca* also in the afore-mentioned place proves, that a Servant has a kind of Freedom in some things, and therein has an Opportunity of obliging his Master; as when he does more than is required of him, what he does not by Command, but of his own free Will, which is not to be esteemed as a Servile Act, but a Friendly Office. So likewise, if a Servant, (as it is (q) in *Terence*) save any thing out of his own Belly, or earned ought in his spare Hours, that properly is his own. *Theophilus* justly defines *ἐξ ἑαυτοῦ*, (r) his Natural Patrimony, as if you should call the

justice us, or as much as our Necessity requires, but what may keep us from starving. And *St. Chrysostom* on *Eph. 5. 2.* where he (the Servant) performs bodily Service, and you feed him; and also cloath him, and provide him Shoes; this is also some kind of Service: For unless you also do this part of your Duty; neither will he do his, but shall be free, for no Law will oblige him to work without Maintenance.

(p) The *Sicilians* are blamed.] And of *Isaacus Angelus* to the *Sicilian* Prisoners mentioned by *Nicetas*, B. 1. who also speaks of the King of *Sicily's* Letter to the *Grecian* Emperor about it.

(q) In *Terence*.] *Phormio*, Act. 1. Sc. 1.

(r) His Natural Patrimony.] *Eumais* in *Odys.* E. 14.

Ὅτι τῆ, &c.

As an indulgent Master bestowed freely
House, Lands and Wife upon his faithful Slave.

And *Ulysses* himself in *Odys.* φ. 21. says to *Eumais* and *Philæus*,

Ἀξιώμας ἀμφοτέρως, &c.

To each of you I'll give a Wife and Land
Near to my own Possessions—

And

the Marriage of Bond Servants a Natural Marriage. But *Ulpian* also calls a small Patrimony a *Peculium*, a Stock. Nor does it import much, that his Master may at his own Pleasure take it away, or diminish it; for if he does it without cause, he will act unjustly. By a Cause, I mean, either by way of Punishment, or for his Lord's Necessity. For the Profit of a Servant is more subject to that of his Lord, than the Goods of Citizens to their City. Agreeable to this is that of (*s*) *Seneca*, *It does not therefore follow that a Servant has nothing, because he cannot enjoy it, unless his Lord pleases.*

3. Hence it is, that the Lord cannot demand again any Debt due to his Servant, in the time of his Service, which he pays him after his Release. Because (as *Tryphoninus* says) in a Personal Action, the Consideration of a Debt, or no Debt, is understood naturally. And the Lord may possibly be a Debtor naturally to his Servant. Therefore as we read, that Clients have bequeathed something to the use of their Patrons, and Subjects to the use of Princes, so have Servants to the use of their Masters. As if a Daughter were to be portioned out, or a Son to be ransomed, or something like it, should happen. *Pliny* (as he relates in his Epistles) allowed his Servants the Privilege even of making their Wills, that is so far, as to distribute, to give, or bequeath within the Family. Among some Nations we read, that even a fuller Right of acquiring things was allowed to Servants, as we have before

And *Varro* of Servants. They are made more industrious by gentle Treatment, either by larger Food, better Cloathing, or sparing somewhat of their hard Labour, and by granting them some small Stock for themselves to improve on.

(*s*) *Seneca*.] And of the same Author again, in the same place. Who makes any doubt but that the Servant with his Stock are all his Lords? Yet he Presents his Lord with a Gift of Acknowledgment.

before explained, that there are different Degrees of Servitude.

4. And the Laws among many Nations have reduced even this External Right of Lords unto this Internal Justice, which we have already expounded. For also among the Greeks it was lawful for Slaves, if they were hard used *ωργον αἰτῶν*, to demand that they might be Sold. And at Rome, to fly to the Statues (for Refuge) or implore the Assistance of the Magistrates in case of Cruelty, Hunger, or intolerable Wrongs. And this also is now practicable, tho' not in strictness of Right, but out of Humanity and Tenderneſs, and ſometimes out of a juſt Equity; that after a long or rigorous Service, Liberty has been granted to the Servant. After that Bondage (ſays *Ulpian*) prevailed by the Law of Nations, the benefit of Release likewise was allowed. We have an Example of this in *Terence*,

*Feci è ſervo ut eſſes Libertus mihi,
Propterea quod ſerviebas Liberaliter.*

*When you were my Slave, I freed you,
(1) Because you ſerv'd me with Integrity.*

Salvian declares that it was daily practiſed, that Servants, tho' not of the beſt, yet, at leaſt, not of the worſt kinds of Servitude, were rewarded with Liberty. And he adds, they were allowed to carry away what they had got in the time of their Service; whereof we have many Examples in

(1) *Because you ſerved me with Integrity.*] *Varro* records, that they uſed ſay to Slaves in *Feronia's Grove*, Let thoſe that have deſerved well ſit down Servants, and riſe freed Men. It was Cuſtomary in ſome Places to releaſe Slaves, taking the eighth part of the Money that they were bought for.

in the Histories of the Martyrs. And here I must commend the Lenity of the *Hebrew Law*, *Deut. xv. 13.* which absolutely commands, that a *Hebrew Servant* having served out such a certain time, shall be set free; (u) and that he should not go away empty; the Contempt of which Law the Prophets grievously complain of. *Plutarch* blames *Cato* the Elder, that he sold his Slaves when they were old, forgetting the Common Nature of Mankind.

VII. If
Captives
may flee
away.

VII. Here arises a Question, whether it be lawful for a Captive taken in a Just War to flee away; I do not mean him, who for some Personal Fault had deserved that Punishment, but who in serving the Publick has fallen into that Misfortune. In real Truth he ought not, because (as I have said) by the general Consent of all Nations, he is engaged on the account of his Country, which yet is so to be understood, unless an intolerable Cruelty has forced him to it. You may see the Answer of *Gregory Neocæsariensis* concerning this Affair, 16.

VIII.
Whether
they that
are born of
Slaves are
obliged to the
Lord, and
how far?

VIII. 1. We have in another place raised an Argument, whether, and how far the Children of Slaves are engaged to the Lord by Internal Right, which on the account of Prisoners taken in War ought not here to be omitted. If the Parents for their own Personal Crimes have deserved Death, their Children for the saving of their Lives are obliged to serve, because otherwise they had not been born. For otherwise Parents have a Power to sell their own Children for Bond-Slaves, to purchase themselves Food and Raiment, as we have already declared. Such a Right did God himself give to the *Hebrews*, over the Posterity of the *Canaanites*.

2. But

(u) That he should not go away empty] Custom brought it to be no less than 30 Shekels. See in the Precept 84.

2. But for the Debt of a City, Children already born, as being part of that City, may be obliged, no less than the Parents themselves. But this Reason cannot hold for those that are yet unborn, but some others are required; as the Concurrence of the express Consent of the Parents, forced purely by necessity of Food, and that even for ever, or for being at the Charge of bringing them up, and that only, till their own Labour shall satisfy for those Expences. If any Right beyond this be allowed to the Lord over them, it seems to be granted by the Civil Law unjustly in favour of the Lord.

IX. 1. Among those Nations where this Right of Bondage over Captives is not practised, the best way will be to Exchange Prisoners; and next to that to release them for a moderate Ransom. Neither can one positively rate the Sum. But common Humanity teaches us, that it should not be so extravagant, as not to leave the Ransomed Person a reasonable Subsistence. For the Civil Law allows this even to those, who by their personal Act are fallen into Debt. But in other Places the Price is set down, as formerly (x) among the Greeks, the Ransom of a common Soldier was a Pound, and in our Days a Month's Pay. *Plutarch* tells us, that the Wars between the *Corinthians* and *Megarenses*, were waged *ἡμετέρας καὶ οὐ γεινῶδας*, Mildly, and like Kinsmen. If any one were taken Prisoner, he was entertain'd by his Captor as a Guest, and taking his Word for his Ransom,

IX. What may be done where the Bondage of Captives is not in use.

(x) As among the Greeks the Ransom of a common Soldier was a Pound.] In the Wars between the French and Spaniards in Italy, the Ransom of a Horse Man was the fourth part of his yearly Pay, not including Captains, or other Superior Officers; nor he who in a just War, or in a Town taken by Storm should come into the Power of the Enemy.

Ransom, freely sent him home. Whence came the Name of *δορυξέυος*, a War Guest.

2. But more Heroick is that of *Pyrrhus*, highly applauded by *Cicero*.

*Nec mi aurum posco, nec mi pretium dederitis,
Ferro, non auro vitam cernamus utrique.
Quorum virtuti belli fortuna prepercit.
Eorundem Libertati me parcere certum est.*

(y) 'Tis not the sight of Gold or Bribes shall win
me,
The Sword shall be decider of the Victory,
But he who by the Lot of War escapes,
I am resolv'd his Liberty to spare.

No doubt *Pyrrhus* thought his War just, yet looked upon himself obliged to restore them their Liberty, whom probable Reasons had engaged against him. *Xenophon* commends the like Act in *Cyrus*. And *Polybius*, that of *Philip the Macedonian* after his Victory at *Gheronea*. *Curtius* that of *Alexander* to the *Scythians*; and *Plutarch* observes of King *Ptolemy* and *Demetrius*, that they strove who should prevail in Civility to the vanquished, as much as in Battle. And (z) *Dromichæthes* King of the *Getes*, having taking *Lyfimachus* Prisoner, entertained him as his Guest, and thereby engaged him, being an Eye-witness of both the Poverty, and Civility of the *Getes*, ever after to desire them for his Friends, rather than Enemies.

CHAP.

(y) 'Tis not the Sight of] *Menander Protector* commends the like Kindness of *Tiberius* a Christian Emperor to the *Persians*; and *Mariana* that of *Sisebutus*, also of *Sancho* King of *Castile*. B. 11.

(z) *Dromichæthes* King of the *Getes*.] *Diodorus Siculus* also mentions it in *Except. Peiræ*.

CHAP. XV.

Moderation in obtaining Empire.

I. **W**HAT by Equity is required, or by Humanity commended to be shewed to single Persons, is so much more to be done to a whole Nation, or part of one, by how much the Injury or Kindness done to many is more remarkable. As other things may be obtained in a just War, so may the Right of Sovereignty over a People, and the very Right which the People have in the Government, (may be acquired) but only so far as the Greatness of the Punishment due to their Crimes, or of any other Debt may justify. To which we may also add, purely to avoid some Extraordinary Danger. But this Cause is for the most part joined with others, which yet either in making Peace, or in managing a Victory, is chiefly to be considered. For in other Cases, whatever is remitted, is to be attributed to Mercy. But that Security which in publick danger exceeds Moderation, is Cruelty. Thus *Isocrates* addresses *Philip*, *It will be enough for you so far to subdue the Barbarians, as to secure your own Country from all danger.*

I. How far Internal Justice allows the gaining of Empire.

II. 1. *Sallust* records of the *Ancient Romans*, *Our Ancestors out of a Religious Consideration took nothing from the vanquish'd, but their Liberty to do wrong.* A Notion well worthy of a Christian; and to this purpose he tells us in another Place, *Wise Men make War for the sake of Peace, and undergo Labour in hopes of Rest.* *Aristotle* often said, *The design of War is Peace, and Rest of Labour.* And this is the meaning of *Cicero's* excellent Saying, *War should be undertaken for no other Reason, but to procure a firm Peace.* And the same Author again, *Wars*

II. To forbear this Right over the Conquered is commendable.

are to be undertaken for this end, that we may live securely in Peace.

2. Agreeably to this our Christian Divines teach us, that the end of War is to remove those Things which disturb Peace. Before the Days of *Ninus*, as we have before observed out of *Trogus*, the Custom was (a) rather to defend the Bounds of an Empire, than to enlarge them. Every ones Dominion was limited within his own Country. Kings did not seek for Empire to themselves, but Glory to their People; and contenting themselves with the Victory, desired not Dominion. To which State St. *Augustine* would reduce us, if possibly he could. Let them consider (says he) that it does not belong to good Men (b) to rejoice at the enlarging their Dominion; to which he adds, It is a greater Happiness to have a peaceable Neighbour, than to subdue an ill one in War. And the Prophet *Amos* highly blames the *Ammonites*, for their eager desire to enlarge their Borders, by encroaching on their Neighbours.

III. Either by mixing the conquered with Conquerors.

III. The prudent Moderation of the old Romans comes very near to this Notion of Primitive Innocence. What would our Empire now have been? (says *Seneca*) if a wholesome Providence had not intermixed the Conquered with the Conquerors. Our Founder *Romulus* (says *Claudius* in *Tacitus*) did so prevail by his Wisdom, that he made those that were his Enemies, the same Day his (Subjects, and) Citizens; and he tells us, that nothing so much contributed to the

(a) Rather to defend the Bounds of an Empire, than to enlarge them.] Thus wrote *Alexander* the Emperor to *Artaxerxes* the Persian. Every Man ought to continue within his own Borders, and not to seek after new Ones; nor should any one, carried away by an uncertain hope, begin a War; but rest contented with his own.

(b) To rejoice at the enlarging their Dominion.] See St. *Cyril*, B. 5. against *Julian*, commending the Jewish Kings on this Account, that they were contented with their own Bounds.

the ruin of the Lacedemonians and Athenians, as their driving away the Conquered as Strangers. Histories give us the Examples of the Sabins, Albans, Latins and other the Italian Nations, till at last Cæsar led the Gauls in Triumph, and then entertained them in his Court. Cerealis in Tacitus thus addresses the Gauls, You your selves generally command our Legions, you govern these, and the other Provinces, you are denied or debarred nothing; and he adds, Wherefore love and value that Peace and Life, which the Conquered and Conquerors equally enjoy. Lastly, what is very admirable, all within the Compass of the Roman Empire, by the Decree of the Emperor Antoninus, were made Citizens of Rome, which are the very words of Ulpian. Thence (as Modestinus observes) Rome was called *Communis Patria*, the Common Country. And thus said Claudian of it,

*Hujus pacificis debemus moribus omnes,
Quod cuncti gens una sumus.*

*We owe this Happy Union of our People
To her Desire of Peace.*

IV. 1. There is another kind of Moderation in Victory, to leave to the conquered, either Kings or People, their own Government. Thus Hercules to Priam,

IV. Or by leaving their Government to the conquered.

*Hostis parvi victus lacrymis,
Suscipe, dixit, Rector habenas,
Patrioque sede celsus folio,
Sed sceptræ fide meliore tene.*

Sen. Troas.

*Won by the Tears of a disabled Enemy,
Once more (says he) receive the Reins of Empire,*

R 2

Fill

*Fill once again, the Throne of your Progenitors;
But, keep your Faith with more Integrity.*

The same *Hercules* having conquered *Neleus*, gave his Kingdom to his Son *Neffor*. Thus the *Perſian* Monarchs left their Kingdoms to the conquered Kings. So did *Cyrus* to *Armenius*, (c) and *Alexander* to *Porus*. This (d) *Seneca* much commends, to take nothing from the vanquiſhed King but Honour. And *Polybius* admires the Moderation of *Antigonuſ*, that when he had *Sparta* in his Power, he left to the Citizens their ancient Government and Liberty; which Act acquired him Praise throughout Greece.

2. Thus the *Cappadocians* were permitted by the *Romans* to uſe what Form of Government they pleaſed; and many Nations after the War (e) were left free. *Carthage* was left free, to be governed by her own Laws, as the *Rhodiens* pleaded to the *Romans* after the ſecond Punick War; and *Pompey* (ſays *Appian*) of the conquered Nations he left ſome free to their own Laws. And *Quintiſ* answered the *Ætolians*, crying out that there could be no firm Peace, till *Philip* the *Macedonian* were driven out of his Kingdom; they had perfectly forgot the Cuſtom of the *Romans*, to ſpare thoſe which they had conquered; adding this, that a great Soul was always

(c) And Alexander to Porus.] *Pepin* to *Aiſtolfuſ* the Lombard.

(d) *Seneca*.] The whole Paſſage deſerves to be read, when there is this remarkable Saying, This is to triumph over Victory ſelf, and to declare, that he found nothing among the vanquiſhed worthy of the Conqueror. Part of the Kingdom was left to *Tigranes* by *Pompey*, *Eutrop.* 6.

(e) Were left free.] To underſtand their Condition, ſee *Polybiuſ*, *Excerpt. Legat. num.* 6. *Suetoniuſ* in the Life of *Cæſar*, when he treats of *Gaul*. *Guilleman* alſo has ſome things not unworthy reading in the *Helvetique* Affairs.

always the most merciful to the vanquished; and Tacitus informs us, that nothing was taken away from Lorfines when he was conquered.

V. Sometimes with the restoring of the Empire, the Conqueror's Security is also provided for.

V. Sometimes by placing of Garrisons.

(f) Thus it was decreed by Quintius, that the City of Corinth should be restored to the Achæans, but a Garrison put into the Acrocorinth. And that Chalcis and Demetrias should be detained, till all fear of Antiochus were over.

VI. The imposing of Tributes is oftentimes not so much to reimburse the Charges of a War, as for the Security both of the Conqueror, and Conquered for the future. Cicero writes thus of the Greeks, *Let Asia also consider, That she can never be free from a Foreign War, or Domestick Quarrels, if she be not secured by the Roman Empire, and since that cannot be done without Tributes; she may very reasonably part with some of her Wealth, to secure to herself a perpetual Peace.* Petilius Cerealis in Tacitus, thus pleads for the Romans with the Lingones, and other Gauls. *We tho' so often provoked, yet still by the Right of Victory offer you one only Condition of Peace, viz. that you pay Tribute. For the Peace of Nations cannot be maintained without Arms, nor Arms without Pay, nor that without Tributes.* Agreeable hereunto is what we have said before, when we treated of unequal Leagues, (g) as to deliver up ones Arms, Fleets, Elephants, to keep no Fort, nor Army.

VI. Or by Tributes, and the like Impositions.

R 3

VII. 1. But

(f) Thus it was decreed by Quintius.] But it was afterwards withdrawn. Polybius, Excerpt. Legat. num. 11. Plutarch in the Life of Flaminius.

(g) To deliver up Arms, Fleets.] See Agathias of the Persians, B. 4.

VII. Pro-
fit arising
from this
Moderation.

VII. 1. But that their own Empire should be left to the vanquished, is not only agreeable to Humanity, but often also to Policy. This is commended among *Numa's* Laws, that he would have no Blood shed at the Rites of the God *Terminus*, thereby intimating that nothing more contributed to a firm Peace, than to live contentedly within our own Bounds. And *Florus* well observes, *It is harder to keep Provinces, than to make them; they are gained by Force, but must be retained by Justice.* Like to this is that of *Livy*, *Particulars are more easily obtained, than Universals preserved.* And *Augustus* says in *Plutarch*, *It is greater to Rule our own Will, than to Govern a large Empire.* *Darius* his Embassadors tell *Alexander*, *A Foreign Empire is dangerous, it is hard to hold what one cannot grasp. It is easier to conquer some Places, than to keep them. How much more eagerly do our Hands catch at what they cannot hold?*

2. Which (*b*) *Calanus* the Indian, and before him *Oebarus*, *Cyrus's* Friend, explains, *By the resemblance of an Oxe's Hide*, which immediately rises up on another side, as you press down one with your Foot. And *T. Quintius* in *Livy*, (*i*) *By the Comparison of a Tortoise*, who when he draws himself into his Shell is safe from harm, but as soon as ever he peeps out of any part, he is presently in danger. *Plato* in his third Book of *Laws*, thus applies the Saying of *Hesiod*, *Omni dimidium plus*, *One half is more than the whole*, (*viz. safer.*) And *Appian* observes, that when some Nations

(*b*) *Calanus* the Indian.] *Plutarch* has it in the Life of *Alexander*.

(*i*) *By the Comparison of a Tortoise.*] *Plutarch* relates thus, *When he would dissuade the Achaeans from attempting the Island of Zacynthus he told them that they would run a great hazard if like the Tortoise they ventured their Head out of Peloponnesus.*

Nations desired to be admitted under the *Roman* Government, were refused; and to some Nations they appointed Kings. In the Opinion of *Scipio Africanus*, the *Roman* Empire in his Days was so large, as to extend it further would be but Covetousness; to keep quietly what they had, would be sufficiently happy; wherefore he so altered that Prayer, in which at their solemn Purgations the *Romans* used to entreat the Gods to prosper and enlarge their Empire, (k) he thus amended it, that they would preserve it in perpetual Safety.

VIII. The *Lacedemonians* and *Athenians* in the beginning of their States, never pretended to any Sovereign Power over conquered Cities, they only insisted that they should use the same Form of Government with themselves. The *Lacedemonians* being under Aristocracy, (the Government of some few principal Men) and the *Athenians* under a Democracy, (that of the Multitude) as *Thucydides*, *Isocrates*, and *Demosthenes* inform us, and also *Aristotle* himself, in his 4th Chapter of his 11th Book, and 7th of the 5th of the Republick, of which very thing, *Hemiochus*, a Writer of those Times, makes this Observation in his Comedy,

VIII.
Examples,
and of the
change of
Govern-
ment among
the conquer-
ed.

Γυναῖκε δ' αὐτὰς δὴ ἐτεράτλητόν τινα
'Αεὶ συνῆσαι δημοκρατία δ' αἰτέρα
'Ονομ' ὅστι τῇ δ' Ἀριστοκρατία δ' αἰτέρα,
Δι' ἃς πεπαρωνήκασιν ἡδὴ πολλὰ λείπει,

R 4

Two

(k) He thus amended it.] *Claudian Julian*, the Consul, mentions this Story in his Epistle to *Propertius*, and *Balbinus*. And *Augustus* imitated it, according to *Dion*, he was commended, that he never attempted a new Conquest, esteeming that enough, which he already enjoyed.

*Two Women, turbulent in their Designs,
Arriv'd amongst 'em; Democratia
The one was call'd, Aristocratia th' other,
These sometime since distracted the whole Company.*

Tacitus mentions the same thing done by Artabanus at Seleucia, He left the Government to the Noblemen according to his own Custom, for the Government of the People, (he thought) borders too much upon Liberty, and the Government of a few too near Tyranny. But whether such Alterations make for the Security of the Conqueror, it is not my business to determine.

IX. If the
Empire be
assumed,
part of it to
be left to the
Conquered.

IX. But if it be not perfectly safe to leave to the Conquered their entire Liberty, yet it may be so moderated, that some part of the Government may be left to them, or their Kings. Tacitus tells us that it was the Custom of the Romans, to make even Kings Instruments of Subjection. So Antiochus is called, *The Richest of all the Kings that were Subject to them*; Βασιλεὺς Ῥωμαίων ὑπηκόῃ, *A King Subject of the Romans*, in the Commentaries of Musonius. And in Strabo about the end of the Sixth Book. Thus Lucan,

Atque omnis Latio, quæ servit purpura ferro.

And every Prince (1) that serves the Roman State.

Thus the Government continued among the Jews in the Sanhedrim, even after the Confiscation of Archelaus. And Evagoras, King of Cyprus (as Diodorus relates) said, he would obey the King of Persia, but that as one King did another. And Alexander

(1) Every Prince that serves the Roman State.] See the Panegyrick spoken to Maximilian.

Alexander offered to Darius, after he had overcome him (m) That he should continue a King over others, provided he would obey him. We have already treated of the manner how a Government may be mixed. Part of the Rule is left to the conquered, as part of the Lands to the ancient Possessors.

X. Yet when all Empire is taken from the conquered, there may be left to them (n) their ordinary Laws, about their private and publick Affairs, and their own Customs and Magistrates. Thus Pliny's Epistles tell us, that in Bithynia, a Proconsular Province, the City Apamea was indulged (o) to govern their State as they pleased themselves. And in another place, The Bithynians had their own Magistrates, their own Senate. So in Pontus, the City of the Amisni, by the favour of Lucullus, was allowed its own Laws. The Goths left their own Laws to the conquered Romans.

X. Or at least some shew of Liberty.

XI. I. Ano-

(m) That he should reign over others, provided he would obey Alexander.] There were also formerly such Kings in Italy, under the Power of other Kings; as Servius upon the 10th Æneid. So Persis in Æschylus,

Βασιλεὺς βασιλέως ὑποχρεὶ μέγαν.

Kings Subject to a greater King.

So among the Turks, as Leunclavius witnesses, B. 18.

(n) Their own Laws.] Philo Legat. ad Caium, says, Augustus took as much care to preserve the Laws peculiar to every Nation, as he did the Roman.

(o) To govern their State as they pleased themselves.] See the 93d Epistle of Pliny, and the following of Trajan, B. 10. Sinope had a popular Republick under the Romans, Appian Mithridat: The Greeks had such a shadow of Liberty under the Romans. See Cicero, B. 6. ad Attic. Epist. 1. Pliny, B. 8. Epist. 24. Cyprians might not be summoned out of their own Island, Cicero ad Attic. 5. 21.

XI. Especially in Religion.

XI. 1. Another Privilege may safely be allowed the Conquered, viz. (p) the Exercise of their own Religion; unless they themselves being convinced, are desirous to change it; which *Agrippa*, in his Oration to *Cajus*, (which *Philo* mentions in his Relation of his Embassy) proves to be both pleasing to the vanquished, and not prejudicial to the Victor. And in *Josephus*, both *Josephus* himself, and the Emperor *Titus*, objected to the Rebellious *Jews* at *Jerusalem*, that by the favour of the *Romans* they might use their own Religious Ceremonies with so much Liberty, that they might drive away Strangers from their Temple, even at the Peril of their Lives.

2. But if the Religion of the Conquered be false, the Conqueror ought to take care, that the true one be not Oppressed; which *Constantine* did, by weakning *Licinius's* Party; and after him the *Franks* and other Kings.

XII. At least we ought to use the Conquered with Mercy, and why.

XII. 1. The last Advice is, where the Empire is entirely and absolutely obtained, there we should treat the Conquered with great Gentleness, so as to make the Profit of the Vanquished to be the perfect Advantage of the Conqueror. *Cyrus* bid the Conquered *Assyrians* be of good Courage, telling them, that their Condition should be the same it was before, only the Name of the King changed; that they should enjoy their Houses, Lands, Wives, and Children as before; and if any one wronged them, he and his would take care to see them righted. We read in *Salust*, The *Romans* chose rather to gain Friends, than Slaves, and thought

(p) The Exercise of their own Religion.] It is better that some God be worship'd there than none. As we lately mentioned in the words of *Severus*. So the *Goths* in *Procopius* declare, that they will compel no Man to embrace their Religion.

thought it safer to govern by Love, than Fear. In the Days of Tacitus, the Britons readily made their Levies, paid their Tributes, and perform'd all Duties enjoined them by the Romans, whilst they were not manifestly injured; but they could not easily bear wrongs, being so far conquered, as to be Subjects, not Slaves.

2. That *Privermian* being demanded in the Roman Senate, what sort of a Peace the Romans expected from them, replies, *If you shall grant a good Peace, it will be firm and lasting; if a bad one, it will not hold long.* And he gives the Reason, *Do not think that any People, or single Person, will ever continue longer in a condition that he does not like, than he is absolutely forced to it.* So said *Camillus*, that Empire was most secure, whose Subjects rejoiced. The *Scythians* told *Alexander*, *There is no true Friendship between the Lord and the Slave; and tho' they live in Peace, yet still the Rights of War remain.* And *Hermocrates* in *Diodorus*, *It is not so glorious to overcome, as to use the Victory with Humanity.* The Saying of *Tacitus* is very applicable, *The conclusion of those Wars is excellent, which are finished with a Pardon.* It is also in the Epistle of *Cæsar* the Dictator, *Let this be the new way of Conquering, to secure our selves with Mercy and Liberality.*

(q) To govern by Love, than Fear.] Thus the *Lacedæmonians* in *Thucydides* 5. say, *We believe that the greatest Enmities may be turned into firm Friendship, not if the one Party revenging it self, and abusing its good Fortune, shall oblige the other to swear to unequal Conditions: But (when they can do so) yet using no less Equity, than Valour in Conquering, they manage the Affair with all the Moderation possible.*

C H A P. XVI.

Moderation concerning those things, which by the Law of Nations have not the Benefit of Postliminy.

1. That
Internal
Justice re-
quires that
what is ta-
ken away by
an Enemy
in an unjust
War be re-
stored.

I. 1. **H**OW far things taken in a Just War may be the Captors, I have declared above, from which are to be deducted, what are recoverable by the Right of Postliminy; for these are to be esteemed as not taken. But things taken in an unjust War, I have already said, are to be restored, not only by the immediate Captors, but by others also, who shall happen to be possessed of them on any account. For no body can make over to another more Right, than he has himself, say the Founders of the *Roman Laws*; which *Seneca* briefly explains, *No Man can give what he has not to give.* The first Captor had no internal Right to them, therefore he cannot possibly have it, who derives all the Title he can have from him. Therefore the Property which the second or third Possessor may have, is what we call External, that is, he is entitled to Defence by all Judiciary Power and Authority, as if he were the right Owner; yet if he pretends this Right against him, from whom the things were unjustly taken, he acts dishonestly.

2. For what some eminent Lawyers have declared concerning a Servant, who being taken by Robbers, afterwards made his Escape to the Enemy; that it was true, that he was taken away, not that he had been among the Enemies, or had returned by Postliminy, can be no Impediment to him as to that thing. The same may be answered from the Law of Nature, concerning him, who being taken

taken in an unjust War, and afterwards by a just War or some other Accident comes into the Power of another. For by Internal Right, there is no difference between an unjust War, and downright Robbery. And (a) *Gregorius Neo-Cæsariensis*, being consulted, made a correspondent Answer, when some of the Inhabitants of *Pontus* had received some Goods taken away by the Barbarians.

II. 1. Therefore things so taken, ought to be restored to them from whom they were took, II. Exam-
ples. which we see frequently done. *Livy* relating how the *Volschi* and *Æqui* were overcome by *L. Lucretius Trecipitinus*, says, *That the Spoil was exposed for three Days in the Field of Mars, that every one might have that time to come and acknowledge his own, and freely take it away.* And the same Author in another place, speaking of the *Volschi* defeated by *Posthumius* the Dictator, says, *part of the Spoil was restored to the Latins and Hernici, upon their owning of it, of another part he made Portsale.* And again, *Two Days were allowed to the Owners to come and claim their Goods.* And the same Author speaking of the Samnite's Victory over the Campanians, tells us, *It was a most joyful one to the Conquerors, for they had taken 7400 Prisoners, and a vast Booty from their Confederates; and the Owners were summoned by Proclamation, to own and take their Goods by a certain Day.* And a little further he gives us the like account of the Romans, *The Samnites endeavouring to take Interamna, a Colony of the Romans, but not able to hold it, they plundered the Country, and carrying off a great number of Men, Cattle, and other things, they accidentally fell into the hands of the Roman Consul, returning Conqueror from Luceria; nor did they lose only their Booty, but*
being

(a) *Gregorius Neo-Cæsariensis.*] Sequ. *Peir. de Pat. Princip. c. 3. quæst. 4. Bruningues de Homag. concil. 241.*

being encumbered with their heavy Baggage, were themselves routed and slain. The Consul by Proclamation summoning the Owners to come to Interamna to fetch their Goods, leaving his Army there, went to Rome on the account of chusing Officers. The same Author also in another Place speaking of the Booty, which Cornelius Scipio had taken at Ilipa, a City of Portugal, says thus, *It was all exposed to view before the City, and leave given to the Owners to take their own, the rest was delivered to the Questor to be sold, and the Money arising from thence distributed to the Soldiers. After the Battel of T. Gracchus at Beneventum, the whole Prey, except the Prisoners, and what Cattle were not owned within 30 Days, were given to the Soldiers; as we read in the same Livy.*

2. Polybius writes of L. Æmilius, when he had conquered the Gauls, *He restored the Spoils to those that came for them.* (b) Plutarch and Appian relate that Scipio did the same, when at the taking of Carthage, he found there many rich Presents, which the Carthaginians had brought thither from the Cities of Sicily, and elsewhere, (*viz. restored them to their first Owners.*) And so does Cicero in his Oration against Verres, concerning the Jurisdiction of Sicily, *The Carthaginians had formerly taken the City of Himera, that had been one of the stateliest and richest of Sicily; Scipio looking upon it as an Act worthy of the Roman People, when the War was ended by the taking of Carthage, took care that their proper Goods should be restored to all the*

(b) Plutarch and Appian relate, that Scipio did the same.] Also Diodorus Siculus excerpt. Peires. and Val. Max. B. 1. cap. 1. num. 6. Also the Humanity of the last Scipio Africanus, was eminently famous; for when he had taken Carthage, he sent about to all the free Cities of Sicily, that they should by their Embassadors fetch back all the Ornaments of their Temples, which the Carthaginians had taken away, and so take care that they were set up again in their former places.

the Sicilians. And the same Author does largely speak of the same Act of *Scipio*, in his Oration against *Verres* concerning Statues. Thus the *Rhodians* restored four Ships to the *Athenians*, which they had recovered from the *Macedonians*, that had formerly taken them from the *Athenians*. So *Phancas* the *Ætolian*, (as *Livy* says) thought it equitable, that all that had belonged to the *Ætolians* before the War, should be restored to them. Neither did *T. Quintius* deny it (c) if the Demand had been only of Cities taken in War; and if the *Ætolians* had not broke the Laws of the Confederacy. Nay, even those Goods which had been Consecrated to the Temple at *Ephesus*, and which the Kings had afterwards made their own, the *Romans* restored to their former Condition.

III. But if such things should come to one in way of Trade, may he not charge him, from whom they had been taken, with as much as they cost him? He may, as we have already said, in Equity, so far as the Recovery of the Possession of those desperate things, might probably cost him, from whom they were taken. If then those Charges may be demanded of him, why may not also our Pains and Hazard be valued, as if a Person should recover another Man's Goods out of the Sea by Diving? Apposite to this is the Story of *Abraham's* returning Conqueror of the five Kings to *Sodom*; *Moses* says, רישב אמכל ורשב, *He brought back all those*

III. Whether any thing may be deducted.

(c) If the Demand had been only of Cities taken in War.] *Pompey* restored *Paphlagonia* to *Attalus*, and *Pylamenes* *Eutrop* 6. In the League between the Pope, the Emperor *Charles the 5th*, and the *Venetians* against *Solyman* (the Turk) it was agreed, that each should have what had belonged to them, *Paruta* 8. Therefore *Cephalenia* taken by the *Spaniards*, was restored to the *Venetians*. There is also a Passage in *Anna Comnena* to the same purpose, where he treats of *Gothofrede*.

those things, (viz. that they had taken away), as related before, Gen. xiv. 16.

2. Neither can the Offer made by the King of Sodom, to restore to him the Prisoners, and to keep the rest himself, as the Reward of his Pains and Hazard, be otherwise applied. But *Abraham* (d) being a Man not only of a Pious Mind, but also of an Heroick Spirit, would take nothing to himself; but of the things recovered (for our Argument relates to them, as I have said already) he gave the Tenth, as being due to himself, unto God, as deducting for his necessary Charges, and some part he desired to be given to his Confederates.

IV. The People or part of them to be restored, if unjustly possessed.

IV. As Things (taken in an unjust War) are to be restored to their proper Owner, (e) So a People, or part of them, are to be returned to their lawful Governors, or even to themselves, if they were free before this unjust Force. Thus was *Sutrium* taken, and restored to its Allies in the time of

(d) Being a Man not only of a Pious Mind, but also of an Heroick Spirit.] *Jacchiades* has well observed upon *Daniel*, v. 17. *Sulpitius* of *Abraham*, he restored the other things to them, from whom they had been taken away. And *St. Ambrose*, B. 1. of the Patriarchs, Therefore because he refused a Reward from Men, he received it from God. Not much unlike this were the Acts of *Pittacus* and *Timoleon*. *Pittacus* the *Mitylenean* being offered by the general Consent of all one half of the Land recovered, he absolutely refused it, reputing it a base thing to lessen the Glory of his Valour by the greatness of the Spoil. *Val. Max.* B. 6 Cap. 5. Num. 1. And of *Timoleon*, thus says *Plutarch*, to accept of those things is not dishonourable, but to refuse them is the part of an exalted Virtue, and shewing that even in those things that are lawful, we can also deny our selves. Compare what has been said above, B. 2. Cap. 14. § 6. and also, B. 4. §. 1.

(e) So a People.] The banished *Saguntines* after six Years, were restored by the Romans. *Anthony* in the War of *Cassius* set at Liberty all those that were made Slaves, and commanded the Goods to be restored to the Owners. So was *Calatrava* restored by the King of *Castille*, and others, to the Soldiers from whom it had been taken away by the Moors. *Mariana*, B. 11. Compare with what has been said above in this Book, Cap. 10. §. 6.

of *Camillus*, as *Livy* informs us. The *Lacedemonians* restored the *Æginetes* and *Melii* to their Cities. And the Cities of *Greece*, which had been oppressed by the *Macedonians*, were set at Liberty by *Flaminius*; who in the Treaty with *Antiochus's* Embassadors, told them, it is Equitable, that all the Cities of *Asia*, which were of *Greek* Original, should be restored to their Liberty, which *Seleucus*, the Great-Grandfather of *Antiochus*, had taken by Force, and afterwards being lost, had been reconquered by this *Antiochus*; for (says he) *those Colonies were not sent into Ætolia and Ionia to be subjected to the King, but to enlarge the Grecian People, and to Propagate that Ancient Nation throughout the World.*

V. It has been sometimes disputed, how long a time is allowed, before this Internal Obligation to Restitution may cease? But this Question, if it be between Subjects of the same Empire, is best decided by their own Laws, provided those Laws admit of this Internal Right, and not of the External only; which may be collected by a prudent searching into the Words and Meaning of those Laws. But if it be between perfect Strangers each to other, it can be decided only by Conjecture from the Dereliction of the Proprietor; of which we have spoken enough in another place to our purpose.

V. In what time the Obligation of Restitution ceaseth.

VI. But if the Right of War be very doubtful, it will be best to follow the Advice of *Aratus* the Sicyonian; who in part perswaded the new Possessors to accept of Money in lieu of them; and in part advised the first Owners rather to accept of the value of their Lands, than run the hazard of recovering them.

VI. What is to be done in a dubious Case.

VOL. III.

S

CHAP.

(f) To follow the Advice of *Aratus* the Sicyonian.] Which King *Antiochus* did, as *Mariana* witnesses, E. 29. Cap. 14.

C H A P. XVII.

Of Neuters in War.

I. From
Neuters no-
thing is to
be taken
but upon
extream
Necessity,
and with re-
storing the
full value.

II. Ex-
amples of
Abstinence,
and some
Precepts.

I. **I**T may seem needless for us to treat of those that are not engaged in the War, when it is manifest that the Right of War cannot affect them; but because, upon occasion of War, many things are put upon them on Pretence of Necessity, it may be proper here, 1. Briefly to repeat what we have mentioned before, that the Necessity must be really extream, to give any Right to another's Goods. 2. That it be requisite, that there should not be the like Necessity in the true Owner. 3. When absolute Necessity urges us to take, we should then take no more than what it requires. That is, if the bare securing of it be enough, we ought not to make use of it; and if the use be necessary, we ought not to abuse it; and if we cannot help abusing it, we ought to return the full Value of it.

II. 1. *Moses*, when he was obliged of Necessity to pass with the *Israelites* through the Country of the *Edomites*, he first offers to go through the Highway, and not to touch their Fields or Vineyards, and if they should want Water they would pay for it. The same did the famous Generals of the *Greeks* and *Romans*. The *Greeks* in *Xenophon* under *Clearchus*, promise the *Persians* to march without doing any Damage; and if they would sell them Provisions, they would not by force take Meat or Drink from any one.

2. *Dercyllides*, in the same *Xenophon*, Led his Army through Neutral Countries, without any Injury to the Confederates. *Livy* tells us of King *Perseus*. He returned into his own Kingdom through *Pthiotia*, *Achaia* and *Thessaly*, without any Damage to the

Countries

Country. And Plutarch of the Army under Agis the Spartan, They were a sight to all the Cities of Greece, (a) marching through Peloponnesus inoffensively, civilly, and almost without any Noise. Thus Velleius says of Sylla, You would think he came into Italy not as a revengeful General, but as a Pease-maker, he marched his Army so quietly through Calabria and Apulia, with such particular Care of the Fruits, the Fields, the Cities and the Men, as far as Campania. (b) And Tully of Pompey the Great, whose Legions so marched into Asia, as not only the Hands of so great an Army, but not even so much as their Feet, could be said to have done the least Damage to any one that was peaceable. And Frontinus of Domitian, When he built Forts on the Frontiers of Ubii, he ordered the Fruits of those Places which he was to intrench, to be appraised and paid for; and the Fame of that particular act of Justice, gained him the Credit of all Men. And Lampridius of Severus's Parthian Expedition, He managed it with so much Discipline, and so great a Reverence to his own Person, that his Men seemed rather Senators than Soldiers: The Tribunes so ready, the Captains so modest, the Soldiers so friendly, that wheresoever they came, the Country People, for so many and extraordinary Benefits, honoured him as a God. The Panegyrist speaks (c) of the

S 2

Goths

(a) *Marching through Peloponnesus without any Noise.*] Plutarch testifies the same of T. Quintius Flamininus.

(b) *And Tully of Pompey the Great.*] And Plutarch: Hearing that some of his Soldiers had misbehaved themselves in their March, he sealed up their Swords (in their Scabbards) which whosoever did not keep, he was severely punished.

(c) *Of the Goths.*] We have many things of the Modesty of this Nation in Cassiodore, as 5. 10. and 11. 13. and in the same Book, Epistle 25. Neither waste the Corn or Meadows of the Inhabitants, but hasten with all Moderation, that your coming may be acceptable to us; for we to that end freely pay Taxes to maintain Armies, that our Properties may be defended from armed Violence, B. 9. 25. The Possessors felt no Damages from his Arms.

Goths, Huns and Alani that served under Theodosius, No Noise, no Confusion, no plundering was there, as from Barbarians; but if their Provisions happened to fall short, they bore it patiently, and proportioned every one's Allowance to their Numbers. And Claudian attributes the same to Stilico.

*Tanta quies, tantusque metus servator honesti
Te moderante fuit, nullis ut vinea furtis
Aut seges erepta fraudaret messe colonum.*

*You ruling us, so great was our Security
That all enjoy'd their own; the Vine her Tribute
Paid to the just Owner; the Husbandman
Received the fruitful Produce of his Fields.*

And (d) Suidas to Belisarius.

3. This may be easily done, by taking care (e) to make full Provision of all Necessaries, having the

(d) And Suidas to Belisarius.] Procopius his Companion, and witness of his Actions, does highly celebrate this Virtue in Belisarius. See his excellent Speech to his Soldiers to this purpose, which he made to them near Sicily, as he was marching to Africk, and the Account of his March thro' Africk. Vandal. 1. but his relation in the 3d of the Gothicks, I shall repeat entirely, He took so much care of the Husbandmen, and acted with so much concern for them, that none of them suffered any Violence, when Belisarius was General of the Army; but on the contrary, they all grew rich, wheresoever he marched the Troops, for they sold their Goods to his Soldiers at their own Price; and when the Corn was ripe, he took particular care that the Horsemen should not spoil it, and no one was allowed to touch an Apple, as it hung on the Tree. See the like Commendation of the Germans in their Expedition to the Holy Sepulchre in Nicetas, in the Life of Mannel Commenus. And Gregoras gives us the same Account of the Venetians, B. 9. Every one was amazed at the Discipline of the Venetians, and at the greatness of their Courage, as also Justice; for no Man durst stir from the Army, or take any thing without paying for it.

(e) Full Provision of all Necessaries.] Pliny, Nat. Hist. 26. 4. Wherefore did the Roman Generals make it their chiefest care in the Wars to maintain free Commerce? And Cassiodore, 4. 13. Let him have wherewithal to buy, that he may not be forced to think of stealing. So likewise 5, 10. and 13.

the Army well paid, and by observing a strict Discipline, whose chief Law (f) *Ammianus* says is, *That the Countries of those at Peace with us should not be wasted.* And in *Vopiscus*, *Let no one dare to take away a Chicken of another Man's, let none touch a Sheep, let none pluck a Grape, let none tread down the Corn, and let none demand Oyl, Salt, or Wood.* And so in *Cassiodore*, *Let them live with the Provincials according to the Civil Law, neither let them grow Insolent, because they are armed; for the Shields of our Army ought to protect the Pagans.* To which we may add that in the sixth Book of *Xenophon's Expedition*, *We must not pretend to compel a City at Peace with us to give any thing against their Will.*

4. From which Precepts we may best understand that Advice of the great Prophet, even of him that was more than Prophet, *Luke iii. 14. Offer Violence to no Man, (g) accuse no Man falsely, and (h) be content with your Wages.* To which agrees that of *Aurelian* in *Vopiscus* in the afore-quoted place, *Let him be content with his Allowance, let him live rather of the Spoil of the Enemy, than of the Tears of the Provincials.* Neither may any one think that this is only bravely spoken, but not to be practised. For neither would so holy a Man (as *St. John*) advise, or wise Law-makers command what they believed not possible

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to

(f) *Ammianus.*] See B. 21.

(g) *Accuse no Man falsely.*] It may be rendred *Abstain from Rapine*, in which Sense the Word is taken, *Job xxxv. 9. Psalm cxix. 122. Prov. xiv. 33. xxii. 16. xxyiii. 3 Eccles. iv. 1. Also Lev. xix. 11. and the Vulgar Translation renders the same Greek Word by defraud, Luke xix. 8.*

(h) *Be content with your Wages.*] *St. Ambrose* upon this place of *St. Luke*, says, *Therefore Soldiers were allowed Pay; lest in search of Provisions they should turn plundering Robbers: Which St. Austin transcribed*

to be done. Lastly, (i) What has been done we must necessarily own possible to be done. Therefore we have brought several Examples. To which we may add, that remarkable one (k) which *Frontinus* mentions out of *Scaurus*, that an Apple Tree full of Fruit standing within the Compass of the Ground where the Camp was pitched, was the next Day, after the Army was gone, found with her Fruit untouched.

5. *Livy* relating how loosely the *Roman* Soldiers lived in their Camp at *Sucro*, and that some of them in the Night-time pillaged the Neighbouring Country that was at Peace, adds this as the Reason, that all Things were done lewdly and disorderly, without any regard to Justice, or Military Discipline. There is also another remarkable Place in the same Author, describing *Philip's* March through the Country of the *Dentbelata*; *They were indeed Allies* (says he) *but the Macedonians being in great necessity plundered them, as if it had been*

scribed Serm. 19, of the Words of *St. Matthew*. There are extraordinary Constitutions in *Gregorius Turonensis*, B. 2. Cap. 37. in *Capit. Caroli* and *Success.* B. 5. Tit. 189. in *Concil. Gall.* Tom. 2, in *Capit.* 2. *Ludowici Pii* c. 14. Tom. 3. in *Concil. ad Macram*. See the Law of the *Bavarians*, Tit. 2. 5. *Gunter* thus translates the Law of *Frederick the First*.

*Si quis pacifica plebis villasve, domosve,
Ufferit, abrasit signabitur ora capillis.
Es pulsus castris, post verbera multa recedet.*

*Whoever Spoils the Peaceable Plebean,
Or burns his Cottages, with a smooth Fate
Unman'd, to run the Gantlope first we'll force him,
And then discharge the Rascal.*

(i) What has been done we must necessarily own possible to be done.] So also *Guicciardine* argues, B. 16.

(k) Which *Frontinus* mentions out of *Scaurus*.] See *Spartian* of the Severity of *Niger* upon a Soldier, for taking away a Dunghill Cock,

been the Enemies Frontiers; for robbing every where, they first laid waste great Houses, then some Towns, to the great dishonour of the King, who continually heard his Confederates in vain calling upon the Gods and him for Assistance. Tacitus highly blames Pelignus, for that he preyed more upon the Allies, than Enemies. And the same Person observes, that the Visellian (Soldiers) were scandalously sloathful throughout all Italy, and only dreadful to those that entertained them. And in Cicero's Oration against Verres, there is this Accusation of the City-Pretor, *You have taken care to have the peaceable Cities of our Allies and Friends plundered and wasted.*

6. And here I cannot omit the Opinion of some Divines, which I hold to be very right, that the King who does not give his Soldiers their just Pay, stands not only engaged to the Soldiers, but to his Subjects and Neighbours for the Damages consequent thereupon, which the Soldiers, compelled by pure Want and Necessity, have done them.

III. 1. On the other side, it is the Duty of those that are not engaged in the War, to sit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his side, as we have said before. But in a dubious Cause (*k*) to behave themselves alike to both Parties; as in suffering them to pass through their Country, to supply them with Provisions, and not relieve the besieged. The *Corcyreans* in *Thucydides* tell the *Athenians*, if they would really be Neuters, they should either forbid the *Corinthians* to raise Men in the Country of *Attica*, or suffer them to do so too. The Ro-

III. What is the Duty of Neuters to those that are engaged in War.

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(*k*) To behave themselves alike to both Parties, as in [suffering them to pass through their Country to supply them with Provisions.] See a singular Example in *Paruta*, B. 8.

mans objected against *Philip* King of the *Macedonians*, that he had doubly broke his League, first that he had injured the Confederates of the *Romans*, and then that he had assisted their Enemies with Men and Mony. *T. Quintius* urges the same in a Conference with *Nabis*. You say, I have not directly violated my League of Friendship with you. How often would you have me convince you that you have? But I will say no more, but to Sum it all together, by what means may Friendship be broken? Certainly by these two chiefly, if you treat our Allies as Enemies, or if you joyn our Enemies.

2. *Agathias* tells us, he is an Enemy who does what pleases an Enemy; and *Procopius* (1) looks upon him to be in the Enemies Army, who supplies them with Things that are properly useful in War. Thus said *Demosthenes* of old, He that invents, or prepares those things, by what I may be taken, is mine Enemy, tho' he neither strikes me, nor throws a Dart at me. *M. Acilius* told the *Epirots*, who indeed had not assisted *Antiochus* with Soldiers, but were accused to have furnished him with Mony, he could not tell whether he should account them Enemies or Neuters. And *L. Æmilius* the Prætor blames the *Teii*, that they had victualled the Enemy's Fleet, and promised them Wine, declaring, unless they did the like to the *Roman Fleet*, he should hold them as Enemies. *Plutarch* mentions a Saying of *Augustus Cæsar*, That City has forfeited her Pretensions to Peace, that entertains the Enemy.

3. It

(1) Looks upon him to be in the Enemy's Army.] And on the contrary he says that he is justly reputed a Confederate, and Friend; not only that stands near in a Readiness, but also he that openly Supplies (an Army) with all Necessaries of War; says *Amalasuntha* in her Letter to the Emperor *Justinian*.

3. It would also be very advantagious, if we could possibly make such an Agreement with both Parties, as with their full Consent we might sit still in quiet, and might be permitted to do common Offices of Humanity promiscuously to them both. *Livy* says, *It behooves those that are Friends to both Parties, to endeavour a Peace, but not to engage on either side.* *Archidamus* King of *Sparta*, observing the *Eleans* inclining to side with the *Arcadians*, writ a Letter to them, with only this in it, *καλὸν ἡ συχία.* It is a good thing to be quiet.

CHAP. XVIII.

Concerning Things privately done in a Publick War.

I. I. **W**HAT we have said hitherto, does most belong to those, who have the chief Command in War, or to those, that execute the Publick Orders. We are now to see, what may be privately done in War, whether we respect the Law of Nature, of Nations, or the Divine Law. *Cicero* relates in his first Book of Offices, that the Son of *Cato* the Censor served in the Army under *Pompilius* the General, and in a short time that Legion was disbanded; yet the Young Man out of a Military Inclination still continuing in the Army, *Cato* writ to *Pompilius*, if he designed to have him still in the Army, to give him a second Oath; adding the Reason, because the former being discharged he could not lawfully fight with the Enemy. He also records the very Words of *Cato* out of his Letter to his Son, in which he warns him from engaging in Fight, for

I. Whether it be lawful to hurt a publick Enemy privately explained by the Law of Nature, of Nations, and Civil Law.

for it is not lawful, for one that is not a Soldier to fight an Enemy. *Plutarch* much commends (a) *Chryfantas* a Soldier of *Cyrus*, who drew back his Sword, that he had lift up to kill his Enemy, upon his hearing the Trumpet found a Retreat. And *Seneca* tells us, *That Soldier is of no use, who regards not the sound of a Retreat.*

2. But they are mistaken, who think this arises only from the External Right of Nations; for if you barely consider that, as it is lawful for any one to seize one his Enemy's Goods, (as we said before) so he may also kill his Enemy, for by that Right Enemies are accounted as not at all. What *Cato* therefore adviseth, proceeds from the Roman Military Discipline, which had a Law (as *Modestinus* observes) that he who did not observe the word of Command, should be put to Death, though he had had good Success; but he was understood not to have obeyed Commands, who without Order, and the General's Command, fought the Enemy, as *Manlius's* Precepts teach us. For if such things might be rashly done, either their Posts would be deserted, or enlarging the Licence, the Army or part of it (b) might be unexpectedly engaged, which must by all Means be avoided. Therefore *Salust* describing the Roman Discipline, says, *They were often punished in War, who contrary to Command had fought the Enemy, as well as they, who being called back, returned late out of Battle.* A certain *Spartan*, when just ready to kill his Enemy, stopt his Blow upon hearing the Retreat sounded, and gave this Reason, *ὅτι βέλτιον ὄντι τὸ φοβεῖσθαι τὸ πρὸς τοὺς ἀρχοῦντι, ἢ τὸ ἀποκτενεῖν τὸν ἐχθρὸν.* It is better to obey our Commanders, than to kill an Enemy. And *Plutarch* gives this Reason, why

(a) *Chryfantas.*] See *Xenophon, Cyri. Instit.*

(b) *Might be unexpectedly engaged.*] Thus *Avidius Crassus* passed the Sentence of Death in the like Case. Saying, *It might have so happened, that Ambushes had been laid; as Volcatius relates.*

why a Man dismiss'd from the Service, cannot kill an Enemy, because he is not obliged by the Military Laws, which they that are to fight must observe. And *Epictetus* in *Arrian* relating the Action of *Chrysantas*, just mentioned, says, *He thought it much better to obey the Orders of his General, than his own Will.*

3. But if we respect the Natural and Internal Right, it seems lawful in a just War for any Man to do those Things, which may be beneficial to the Innocent Party, provided it be within the just Measure of making War; unless perhaps he may require a just Punishment by the common Right of Men. Which last how it is restrained by the Evangelical Law, may easily be understood from what we have said before.

4. A Command then may be either General or Special, as the Consul cryed out in the Tumult among the Romans, *Let them that wish well to the Commonwealth, follow me.* Nay, this Right of killing is sometimes granted to every Subject, even beyond his own Defence, when the publick Safety requires it.

II. 1. They may have a Special Command who receive Pay, but also they who go to War at their own Expences, and what is more, they who maintain part of the War at their own Charges; as they who build Ships, and maintain them at their own private Cost; who to reimburse themselves (*instead of Pay*) are allowed the Liberty to take Prizes, as we have said elsewhere; but how far this may be reconcilable to internal Justice, and Charity, may admit of a just Dispute.

II. *What may they do, that make War at their own private Charge, or fit out Ships, by Internal Justice, in respect of the Enemy.*

2. Justice either respects the Enemy, or the City self, with which we contract. We have already said, that the Possession of all Things relating

ting to War, may for our own Security be taken away from an Enemy, but even this with a Condition of Restitution; but the Property of those Things can be no longer retained, than to satisfy for the Charges that City may have been at, in maintaining a just War, either at the beginning of the War, or in the Prosecution of it, whether the Things belong to a City at Enmity with us, or particular Persons, that may be of themselves innocent; but the Goods of the Guilty, by way of Punishment, may be taken away, and become the Captor's. Therefore the Goods of their Enemies shall be theirs, who maintain part of the War at their own Charge; what respects the Enemy, so far, as that the reasonable Satisfaction which I have mentioned, be allowed, to be adjudged by equal Arbitrators.

III. *What in respect of their own City.*

III. But as to the City, the very same will be Just, according to internal Justice, if there be an Equality in the Contract, that is, if our Charges and Hazard be but equal to the Booty, gained. But if this hope does far exceed, the Overplus is to be restored to the City; just as if one should buy at a very low Price the Cast of a Net, indeed uncertain, but yet very likely and possible.

IV. *What the Law of Christian Charity requires of us.*

IV. Besides, even when we do not offend in strictness of Justice, we may yet Transgress against the mutual Bond of Christian Charity, which consists in loving others; especially if it appears, that such a Plundering doth not so much hurt the State, or the King, or particular offensive Persons, but rather the Innocent, whom it may render so extremely Miserable, that if we should use the like extremity to our own private Debtors, it would be judged barbarously Cruel. But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weakens the Enemy,

(c) the

(c) the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian.

V. But it happens sometimes, that from the occasion of a publick War, there arises a private one; as if a Man should by Chance fall among his Enemies, and be thereby in danger of losing his Life or his Goods, in which Case he may lawfully use those Means to defend them, which we have elsewhere mentioned, of the Method allowable in Self-Defence. Also Publick Authority usually secunds private Profit, as when a Person who has suffered an extraordinary damage by the Enemy, obtains a Commission to make Reprisals upon the Enemy, in order to refund himself; which Right is to be limited in the same manner, as we have already spoken of Pledges, or Things in Pawn.

V. How a private War may be mixt with a publick.

VI. Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy's Houses, lay waste their Fields, and commit such other Acts of Hostility, without any Command, and besides when there is no necessity, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added, what they have omitted, if there be not a just Cause; for if there be, he may perhaps be answerable for it to his own City, whose Laws he hath transgressed, but not to his Enemy, to whom he hath done no Wrong. Not unlike to this was the Answer which a certain Carthaginian made to the Romans, when they demanded Hannibal to be delivered up to them. *The Question is not whether Saguntum*

VI. What he stands obliged to, who with our Command burns an Enemy, explained with a Distinction.

(c) The gain arising to himself only from the Unhappiness of the Times.] For Plutarch also blames Crassus for this very thing. The most of his Wealth he gained by Fire and War, making his private Advantages, by nothing more than the publick Calamities.

Saguntum was besieged by a private Command, or publick Decree, but whether the Fact were just or unjust? For it is our Business to call our own Subject to an Account, whether he did it by his own Authority or ours? All you have to ask is, whether it ought to be done according to the League between us.

C H A P. XIX.

Concerning Faith between Enemies.

I. Faith is to be kept with all sorts of Enemies.

I. I. **W**E have already said, what, and how much may be lawfully done in War, partly considered simply, partly from a fore-going Promise. The first part being concluded, the other remains to be discuss'd, which is, concerning Faith (to be kept) between Enemies. It is a remarkable Saying in *Silius Italicus*, of a Roman Consul,

Optimus ille
Militiae, cui postremum, primumque tueri
(a) *Inter bella fidem* —————

That General well deserves our Praise, who constantly Respects his Faith, in War.

Xenophon in his Oration concerning *Agésilas*, says, So Great and Excellent a thing it is for every Man, but especially for Generals to be good, and just, and to be so accounted. And *Aristides* in his fourth *Leuctica*. They that act justly in Peace, and publick Contracts, are to be valued: For as *Cicero* well observed

(a) *Inter bella fidem.*] *Archelaus* the Philosopher in *Appian*, *Civil*. You have sworn in a League, you have joined right Hands. which is of force even among Enemies. *Diodorus Siculus* highly extols. *Sc. Africanus* the Younger for this Virtue. *Excerpt. Peires.*

ved in his fifth Book of Bounds, *There is no body, but approves and commends that Affection of Mind, by which not only no Interest is sought, but on the contrary Faith is kept against Profit.*

2. It is the publick Faith, as it is in *Quintilian* the Father, that makes Truce between armed Enemies, and preserves the Rights of yielded Cities. And the same Author in another Place: *Faith is the surest Bond of Human Things, the Reputation of Faith is Sacred among Enemies.* And so *St. Ambrose*: *It is plain that Faith and Justice must be strictly observed in War.* And in (b) *St. Augustine*, *When our Faith is engaged, it must be kept even to our Enemy, tho' at that time at War with him.* For their being Enemies, does not make them cease to be Men. And all Men endued with the faculty of Reason are capable of a Right from a Promise. *Camillus* declares in *Livy*, *That he had such a Society with the Falisci, as was inbred by Nature.*

3. And from this Society of Reason and Speech, arises that Obligation from a Promise, which we now treat of. For it is not to be imagined, (because it is the Opinion of some (as I said before) that an Enemy has the Privilege and Licence to speak deceitfully, and yet be blameless) that by a Parity of Reason, it may be practised after we have given our Faith. For the Obligation to speak Truth arises from a Cause, far more ancient than War, and perhaps may be somewhat extenuated by War, but a Promise of it self confers a new Right. *Aristotle* perceived this Difference, when treating of speaking Truth, he said, *I do not speak of him, who speaks the Truth in Conferences, or in what relates to Justice, or Injustice; for they relate to another Virtue.*

4. Pau-

(b) *St. Austin.* Who largely treats of the same Subject, *Epist.*
225.

4. Pausanias said of Philip of Macedon, No body can justly call him a good General, who has always despised his sacred Oaths, and has upon the slightest Pretence broke his Faith, the most of any Man. And the like says Valerius Maximus of Hannibal. A profest Enemy to the Romans, and all Italy, and a greater to Faith it self, glorying in Lies and Falsehood, as if laudable Virtues; whence it came to pass, that whereas he might otherwise have left an illustrious Memory of himself, he now left it disputable, whether his Vices did not exceed his Virtues. In Homer, the Trojans pricked in Conscience condemn themselves.

Νῦν δ' ὄρκια πίσσ'
 Ψευδάμενοι μαχόμεθα τῷ ἑ νύ τι κάλλιον ἔστι.

Our Arms we bear,
 Perjur'd as we are, against the haters
 Of Lies and Falsehood.

II. The Opinion refused, that Faith is not to be kept with Thieves and Tyrants.

II. 1. We have already said, that we may not allow of that of Cicero, No Society is to be held with Tyrants, but rather the greatest Difference: And again, A Pirate is not to be ranked among the ordinary Enemies, there ought to be no Faith nor Oath kept with him. Nor that of Seneca concerning a Tyrant, Whatever Engagements I had with him, they are all void, he is cut off from the Common Right of Mankind. From which Fountain arose that Error of Michael of Ephesus, who says in his fifth of his Nicomachians, (c) It is no Adultery to Debauch a Wife of a Tyrant. Which

(c) It is no Adultery.] Seneca in Excerpt. 4. 7. Not reckoning it Adultery to debauch the Wife of a Tyrant, nor Murder to kill a Tyrant. and Julius Clarus in § Homicid. num. 36. thought that an outlawed Woman should not be punished as an Adulterer, though she were defiled.

[Which very thing (d) some of the Jewish Doctors erroneously maintained concerning Strangers; whose Marriages they esteemed void.

2. (e) Yet *Cn. Pompey* finished most of the Piratick War by Composition, agreeing to save the Men's Lives, and allow them a Place where they might live without Robbery. And sometimes Tyrants have been the Restorers of Liberty and Impunity. *Cæsar* in his third of his Civil Wars writes, that the *Roman* Captains compounded with the Robbers, and Fugitives, that were in the *Pyrenean* Mountains. Now who can say that such a Composition is not Obligatory? Indeed they do not create so friendly a Communion, which the Law of Nations hath introduced between Enemies engaged in a solemn and just War. But yet, because they are Men, it may produce the Communion of a Natural Right, as *Porphyry* rightly argues in his third Book of not eating living Creatures, whence we may fully conclude, that such Contracts are to be performed. So *Diodorus* relates, that *Lucullus* kept his Faith to *Apollonius* Captain of the Fugitives. Thus *Dio* writes, that *Augustus* punctually paid the Ransom imposed upon him by *Crocata* the Robber, being surprized by him, because he would not break his Faith.

III. 1. But let us see if we cannot produce out of *Cicero* something more to our purpose; and first, that they who are notoriously wicked, and Members of no Community, may be punished by any Man, by the Law of Nature, as we have declared above. But they who may be punished, even with Death, both their Goods, and their Rights

III. This Objection answered, that such deserve Punishment, and shows this is not considered, when we treat with them as such.

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(d) The Jewish Doctors.] Rabbi Levi Ben-Gerson, and Rabbi Salomo on Lev. 20. 10.

(e) Pompey finished by Composition.] Thus *Didius* was condemned as perfidious, unto the *Celtiberians*, who lived by Robbery.

may be taken from them. As the same *Cicero* well observes, *It is not against Nature to strip him, if we can, whom it is meritorious to kill.* But among his other Rights, is also a Right derived from Promise, and this too may be taken away from him by way of Punishment. To this I answer, it may be, if we did not treat with him as an Offender; (f) but if we treat with him as such, it is to be understood, as if we were willing to remit the Punishment due, as to that Fact, because (as we have said elsewhere) Promises are to be taken in that Sense, as not to make void the Act.

2. *Nabis* replied well in *Livy*, when *Quintius Flaminus* objected Tyranny to him. *I answer, whatsoever I am, just the same I was, when you your self (Q. T. Quintius) made a League with me.* And again, *had done these things already, whatsoever they are when you contracted Friendship with me;* to which he adds, *If I had changed, I ought to have given a Reason for my Inconstancy; but since you have changed you ought to give a Reason for yours.* Like to this there is a Place in the Oration of *Pericles* to his Subjects, recorded by *Thucydides*, *We shall let the Cities live by their own Laws, that did so when we entered League with them.*

IV. No Objection, that the Promise was extorted by fear, if the Promiser was not himself affrighted.

IV. It may likewise be objected, as I said before that he who through Fear has forced a Promise from one, ought in Equity to release the Promisee because he damnified him by Injustice, that is

(f) *If we treat with him as such.] Terence in Adelph.*

Leno sum fateor, &c.

*Tho' I am a Bawd, the common Bane of Youth,
A forsworn Wretch, a public Nuisance, yet I never
Did you any Wrong, Sir!*

Echard's Test.

See upon this Subject the Writer of the Terms of Peace between the Princes and States of the Empire,

by an Act both repugnant to the Nature of Liberty, and of the Act it self, since he should have been free. Tho' this (I confess) in some cases holds true, yet it does not respect all Promises made to Robbers; for that the Promised be obliged to disengage the Promiser, it is required, that he have extorted the Promise by an unjust Fear. If any one then, to release his Friend from Bondage, shall promise to pay his Ransom, he is bound to do it, because he cannot pretend to have been influenced by Fear, who came voluntarily to make this Contract.

V. Add to this, that he that is compelled by an unjust Fear to make a Promise, may be obliged to perform it, if he has confirmed it by an Oath; for thereby (as I have said before) the Man stands bound not only to a Man, but unto God, against whom Fear can be no Exception. Yet it is true, that the Heir of the Promiser does not stand bound by such a sole Promise, tho' confirmed by Oath; for those things only pass to the Heir, which by the Original Right of Dominion are passable from Man to Man, in common Trading: But those things that are due unto God, cannot, as such, be included in these. Again, and (here we must repeat what we have said before) if a Man does happen to break his Faith to a Thief, whether sworn, or not sworn, he shall not upon that account be liable to Punishment among other Nations; because in detestation to Thieves and Robbers, all Nations by a general Consent are pleased to connive at any thing (tho' never so unjustly) done against them.

VI. What shall we say of the Wars that Subjects make against their Kings, or such as have the Supreme Authority? Tho' they may possibly have a Cause not in it self unjust, yet that they cannot have a Right to act by Force against their Prince,

V. Or if there passed an Oath tho' with Men, such a Violation is not punishable.

VI. The same apply'd to rebellious Subjects.

I have shewed elsewhere. And sometimes too their Cause may be so Unjust, or their Resistance so Obstinate, that it may be severely punished. But yet, if they be treated with as Deserters, or Rebels, and a Promise made to them; a Punishment, tho' justly due, is not to be pleaded to prevent the performance of that Promise, according to what we have said already. For the Piety of the Ancients would not suffer them to break their Faith, even to their Slaves; it being generally believed, that the *Lacedemonians* suffered a Divine Vengeance for putting to Death their *Tenarian* Prisoners, contrary to their Covenants. And *Diodorus Siculus* observes, that the Faith given to Slaves in the Temple of the *Palici*, was never broken by any of their Lords: Neither will any Exception of Fear be allowed in this case, if the Faith given be confirmed by an Oath. As (g) *M. Pomponius*, the Tribune of the People, being bound by an Oath, tho' compelled by Fear, punctually performed what he had promised to *L. Manlius*.

VII. A special difficulty concerning Promises made to Subjects in respect of the Sovereign Power, handled.

VII. But a greater difficulty than any yet mentioned may arise from the Legislative Power, and from that Super-eminent Right of Dominion over the things of Subjects, and upon that account is exercised by him who has the Supreme Power: For that Right, if it reach to all the Goods of the Subjects, why not then to that Right also derived from a Promise made in War? Which if granted, all such Covenants seem to be void, and so all hopes of concluding a War, but by a Victory, would be lost. But on the contrary

(g) *M. Pomponius the Tribune of the People*. The Tribune swore, and kept his Oath, and gave a Reason to the Assembly of his dropping the Accusation; no one else could safely call the Tribune to Account. *Seneca de Benef.* 3. c. 37.

ry we must observe, that this Super-eminent Right is not to be promiscuously used, but so far as is generally convenient in a Government not Tyrannical, but Civil, even Regal. But it is generally expedient, that such Agreements should be performed: Agreeable hereunto is what we have already said of the Defence of the present Government. Add hereunto, where necessity requires this Sovereign Right to be used, Satisfaction is to be made, as hereafter shall be more fully explained.

VIII. 1. Moreover Agreements may be confirmed by Oath, and not only by King, or Senate, but by the whole Body Politick; as *Lycurgus* bound the *Lacedemonians*, and *Solon* the *Athenians* by Oath to observe their Laws. And lest by the Change of the Persons the binding Power of the Oath should lose its Force, to renew the same Oath every Year. For if that be done, there would be no receding from the Engagement, not even for the publick Advantage. For a City has Power to part with its own, and the words may be so plain, as to admit of no Exception. *Valerius Maximus* thus speaks to the City of *Athens*, Read your own Law which obliges you by Oath. The *Romans* (b) accounted such Laws Sacred, which they were obliged to keep by Oath, as *Cicero* says in his Oration for *Balbus*.

VIII. And it is declared, that such Promises may be confirmed by the Oath of the City.

2. There is in the 3d Book of *Livy* a Discourse agreeable to this, tho' of it self more obscure; where from the Opinion of several Expositors of the Laws, he declares, that the Tribunes of the People were Sacred: But so were not the *Ædiles*, Judges, nor *Decemviri*, and yet to hurt any of these was forbid by Law. The Reason of the

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diffe-

(b) Accounted such Laws sacred.] See *Manutius de Legibus*.

difference is, because the *Ædiles* and the rest were sufficiently secured by the Law it self; but what the People last of all Enacted, was inviolable; yet whilst the Law was in force, no Man could have a Right to act contrary to it. But the publick Religion of the *Romans* defended the Tribunes; for they had all taken an Oath which they could not violate, without notorious Scandal to their Religion. *Dionysius Halicarnassensis* thus records it in his sixth Book: *Brutus, calling an Assembly, proposed to the People, that the Tribunes might be rendred Sacred and Inviolable, not only by the Law, but also by a publick Oath, to which they all agreed.* Hence this Law was called *Sacred*. And therefore (i) that fact of *Tiberius Gracchus*, in deposing *Ostavius* from the Tribuneship, pretending that the Tribune's Power derived its Sanctity from the People, and not to be employ'd against them, was condemned by all good Men. Therefore (as I have said) both a City and a King may be bound by an Oath made to their own Subjects:

IX. Or if
a Promise be
made to a
third Per-
son.

IX. But farther, a Promise made to a third Person, who has given no cause of any Fear, shall be of full force. But we shall not examine, wherein and how far that third Person may stand interested in it, being one of the Niceties of the *Roman* Law. For by Nature it is the Duty of all Men to consult the Safety of others. Thus we read, *That Philip (k) having made Peace with the Romans, was denied the Power of punishing the Macedonians,*

(i) *The fact of Tiberius Gracchus.*] See it largely related by *Plutarch* in his Life.

(k) *Having made Peace with the Romans, was denied the Power of Punishing the Macedonians, that in the War had revolted from him.*] There is al like Example in *Patrua*, B. 6.

cedonians, *that in the War had revolted from him.*

X. But yet (as we have already proved) it is possible, that a State may sometimes become mixt, as from one pure Form into another, so it may also by Covenant, or Agreement, pass into a mixt. So that they who before were Subjects, may begin to settle the chief Government in themselves, or at least some part of it, even with the Liberty to defend their Party by force of Arms.

X. How the publick State may be charged.

XI. 1. But a solemn War, that is, publick, and denounced on both sides, as it peculiarly enjoys many other things by external Right, has also this, that whatever Promises are made in that War, or for bringing it to a conclusion, are so valid, that tho' they were Occasioned by a Fear unjustly caused, yet they cannot be made void without the Consent of the Promised. Because as many other things, tho' in themselves not wholly just, are yet by the Law of Nations reputed so, (1) so shall Fear be, which in such a War is occasioned on either side; which if it were not allowed, such Wars, which are but too frequent, could be neither moderated, nor concluded, which are very convenient to be done for the good of Mankind. And this we may reasonably suppose to be that Right of War, which Cicero says, must be kept with the Enemy; who also tells us in another place, that an Enemy retained some Rights in War, that is, not only natural ones, but also some derived from the Consent of Nations.

XI. That Fear in a Solemn War by the Law of Nations is no just Exception.

2. Neither does it from hence follow, that he who has extorted such a thing in an unjust War,

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may

(1) *So shall Fear be, which in such a War is occasioned on either side.]*
See the afore said Writer de Compos. Pacis.

may without breach of Piety, or Honesty, keep what he has got, or compel another to stand to his Covenants, whether sworn or not sworn. For Internally, and in the very Nature of the thing, it still continues unjust: Neither can this Internal Injustice of the Act be taken away, but by the new and entire free Consent of the Promiser.

XI. What is to be understood by such a Fear as is allowed by the Law of Nations.

XII. Further, whereas I have said that Fear is accounted Just, which is caused in a solemn War, (m) it is to be understood of such a Fear as the Law of Nations allows of. For instance, if any thing be extorted through the fear of Ravishment, or any other Terror, contrary to our Faith given, this ought to be adjudged by the Law of Nature, because the Law of Nations takes no Cognizance of any such Fear.

XIII. That Faith is to be kept with the Perfidious.

XIII. 1. That Faith is to be kept even with those that are Perfidious, I have in a general Treatise already proved; as St. Ambrose also informs us, which doubtless extends to Enemies that are treacherous; such as the Carthaginians, with whom nevertheless the Romans inviolably kept their Faith. Valerius Maximus says on this Subject, *The Senate regarded not those by whom this was done.* And likewise Salust, *In all the Punic Wars, tho' the Carthaginians in time of Peace, and of Truce, had committed many notorious Outrages, yet they (the Romans) never returned the like to them, when they had an opportunity.*

2. Appian makes this Observation of the Portuguese, whom Servius Galba, for often breaking their League, circumvented by a new League, and slew them, *He avenged one treachery by another,* and to the Scandal of the Romans, imitated the Barba-

(m) It is to be understood of such a Fear as the Law of Nations allows of.] Thus a Promise forced from an Ambassador being a Prisoner, shall be of no Advantage to him that extorted it, Mariana 30.

Barbarians. The same Galba was afterwards accused for it by *Libo*, a Tribune of the People; which *Valerius Maximus* relating, thus censures it: *Compassion, not Equity, pleaded in that Cause; for the Absolution, which his own Innocency could not demand, was granted him in respect of his Children.* And *Cato* writes in his *Originals*, he would certainly have suffered, if his Children and his Tears had not interceded for him.

XIV. But we must also observe, that there are two ways, whereby to avoid the Crime of Perfidiousness, and yet not perform the Promise; namely, in default of the Condition, or by making Satisfaction otherwise. The Promiser is not really discharged for want of the Condition; but the Event shews, that there had been no Obligation, but what was contracted upon condition. To which we may refer this, if the former do not perform what he was bound on his part to do. For the particular Heads of one and the same Agreement seem to be intermix'd with each other in the manner of a Condition, as if it had been thus express'd, I will do these things thus, provided the other also do what he has promised. Therefore *Tullus*, in his Answer to the *Albans*, calls the Gods to witness, whether of the two Nations had scornfully sent back the *Embassadors* reclaiming their own, that all the Miseries of War might light upon them. *Ulpian* observes, He shall not be held a Confederate, who has renounced his League, because some Article, on which it was first made, is not performed. For which Reason, when it is otherwise designed, it used to be expressly mentioned, if any thing be done contrary to this or that Article, yet shall the rest be in full force.

XIV. Not if the Condition be not performed, or if either Party refuse to stand to any part of the Agreement.

XV. (n) We

XV. Neither when there is a just Compensation offered.

XV. (n) We have elsewhere declared the Original of Compensation, that is, when we cannot otherwise recover what is our own, or what is justly due to us, we may receive from him, who either keeps what is ours, or is indebted to us, the full Value thereof in any thing else; whence it follows, that we may much more keep what is actually in our Possession, whether Corporeal or Incorporeal. Whatever therefore we have promised, we need not perform, if it be of no greater Value than that of ours, which the other part injuriously detains from us. (o) Seneca says in his sixth Book of Benefits, *Thus the Creditor is often cast by the Debtor, when he has upon some other account taken more than the value of his Debt. For the Judge only sits between the Creditor and the Debtor, who may say to the Plaintiff, You lent your Money, what then? You now possess Land, which you never purchased, wherefore upon a just Valuation, depart you hence a Debtor, who came a Creditor.*

XVI. Tho' by another Contract.

XVI. It will be the same Case, if he with whom I deal owes me as much, or more, upon any other Contract, and I cannot otherwise recover it. In Courts of Justice (p) the same Seneca says, there are some separate Actions, neither is the form confounded; but those Precedents, as it is there said, are contained within certain Laws which of necessity must be followed. One Law is not mixt with another, we must go as we are led. The Law of Nations allows no such Distinctions, namely where there is no other Hopes of recovering our own.

XVII. The

(n) *We have elsewhere declared the Original of Compensation.*] B 2. cap. 7. § 2. Tertullian in *Scorpiacus*. Comparison is odious to no Man, in which common regard is had either to a Kindness or an Injury.

(o) *Seneca in his sixth Book de Benef.*] Cap. 4.

(p) *The same Seneca.*] In the same Book, Cap. 6 and 7.

XVII. The same may be said, where he that exacts a Promise, hath made none himself, but hath damnified the Promiser. (q) As the same Seneca testifies, *The Farmer is not bound to his Landlord, though his Lease be not cancelled, in case he wilfully tramples down his Corn, cuts down his Trees; not because he has received what he agreed for, but because he has prevented his Tenant's receiving whereby he might pay him.* Then he gives other Instances. *You have drove away his Cattle, you have killed his Servant.* (r) And again, *It is lawful for me to compare the Good that a Man has done me, with the Hurt he does me, and then declare, whether I am more indebted to him, or he to me.*

XVII. Or
some Da-
mage done.

XVIII. Lastly, whatsoever is also due to the Promiser by way of Punishment, may be balanced. Which in the same Place of Seneca is clearly demonstrated. *Thanks is due for a Kindness, and Revenge for an Injury. I neither owe him Thanks nor be Punishment to me, we are fully discharged one of another.* And again, (s) *By comparing the Benefits and Wrongs which I have received, I shall find whether I am indebted to him, or he to me.*

XVIII. Or
for some Pu-
nishment
due.

XIX. But as whatsoever is disputed in Law cannot, whilst the Suit depends, be ballanced against that which is promised, whether it be the thing contended for, or the Costs and Damages of the Suit: So during the Continuance of the War, neither can that which first occasioned the War, nor the Damages allowed by the Law of Nations in War, be satisfied for. For the Nature of the Business, left nothing at all be done, sheweth, that bating the Disputes of War, they are agreed. For otherwise there could be no Agreement made so firm that

XIX. How
these take
place in
War.

(q) *The same Seneca.]* In the aforesaid Cap. 6.

(r) *Again.]* Cap. 6.

(s) *By making Comparison]* The same Cap. 6.

might not be evaded. Whereto I may properly apply that Saying, (t) of the same famous *Seneca*, *Our Ancestors would allow of no Excuses, that Men might be assured that Faith was always to be kept. For it were better not to admit of an Excuse, tho' just, from a few, than encourage others to make them.*

2. But what things are those that may Compensate for a thing promised? Undoubtedly, if the Promised is indebted any thing to us, by any other Contract made since the War; if he has done us any Damage in the Time of Truce; if he has violated Embassadors any ways, or done any thing else, which the Law of Nations does not allow of between Enemies.

3. But we must observe, that Satisfaction be made between the same Persons, and that the Right of no third Person be injured, but with this Condition, that the Subjects Goods must stand engaged for the Debts of their own City by the Law of Nations, as I have said elsewhere.

4. To which we may add, it is the part of a generous Soul to keep firm to his League, even after Injuries received; on which account that wise *Indian, Jarchas*, highly commended the King, who being injured by a Confederated Neighbour, would not break his Faith given, saying, *That he had sworn so solemnly, that he durst not hurt the other, no not after great Provocation.*

5. Now what Questions use to arise concerning Faith given to Enemies, may almost all of them be resolved, if they be applied to the Rules before prescribed; for we have discours'd concerning the Obligatory Power, as of Promises in general, so of a special one made by Oaths, Leagues, and Covenants, and of the Right and Obligation of Kings, and

(t) Of the same famous *Seneca*.] *De Benef.* 7. 15.

and concerning the Interpretation of ambiguous Promises. Yet for the better use of what hath been said already, and to clear any Doubt that may arise hereafter, I shall not think much to point out some of those special Cases which are most remarkable, and most frequently occur.

CHAP. XX.

Concerning the Publick Faith whereby War is finished; of Treaties of Peace, Lots, Set Combats, Arbitrations, Surrenders, Hostages, and Pledges.

I. **A**LL Agreements between Enemies depend upon Faith, either expressed or implied. Faith express'd, is either Publick or Private. Publick is either of the Supreme or Subordinate Powers. That of the Supreme Powers, either puts an end to the War, or is of force during its continuance. Among those things that conclude a War, some are looked on as Principals, some as Accessaries. The Principals are those very things that finish the War, either by their own immediate Act, as the Articles of Agreement, or by Consent that it be referred to another thing, whether Lots, the Success of a Battel, the Judgment of Arbitrators; whereof that by Lots is altogether Accidental, the other two moderate the Case by the Strength of the Mind, or of the Body, or by a discerning Faculty.

II. They who have Power to begin a War, have likewise Power to enter upon a Treaty to finish it; for every Man is the best Manager of his own Affairs; whence it follows, that in a War

I. *The Division of Faith between Enemies, in order to what follows.*

II. *The Power of making Peace is in the King, if the Government be Regal.*

on both sides publick, it is wholly in their Power who enjoy the Supreme Authority, which in a Government truly Monarchical (a) belongs to the King, if so be that Prince have a free and absolute Authority to do it.

III. *What if the King be an Infant, Mad, a Prisoner, an Exile?*

III. For if a Prince be not out of his Minority, (which in some Kingdoms is determined by Law, in others by probable Conjectures) or be not in his true Senses, he is not capable of making Peace. The same is to be said (b) of a King that is a Prisoner, if his Kingdom had its first Rise from the Consent of the People; for it is not to be supposed, that a People should ever entrust their Government unto those that were not at liberty to exercise it. Therefore in such a case (c) not the full Power, but the Administration of it, and as it were the Guardianship is in the States, or whom they shall delegate. But of those things which are privately his own, whatsoever a King, tho' a Prisoner, shall Contract, will stand valid, after the Examples of those things which we shall say of private Agreements. But what if a Prince be an Exile, (d) is it in his Power to make Peace? Yes certainly, if it appear that he lives free.

Other-

(a) *It belongs to the King.* Mariana 21. 1.

(b) *Of a King that is a Prisoner.* See Guicciardin, B. 16. and 18. often.

(c) *Not the full Power.* Arumaus in his Treatise of the Golden Bull. Rodolph, C. Palatin, for fear fled into England. Henry of Meniz was drove out by the Forces of Triers; yet they did not thereby lose their Right of Election.

(d) *Is it in his Power to make Peace?* Lucan,

——— *Veios habitante Camillo*
Illic Roma fuit. ———

——— *Camillus residing with the Veii*
Rome was there ———

See Chassanaus de Gloria Mundi, part 5. confid. 89.

Otherwise his Condition would be little different from that of a Prisoner, for there are a sort of Prisoners at large. *Regulus* refused to declare his Opinion in the Senate, alledging, that as long as he was bound by an Oath to his Enemies, he could not rightly be a Senator.

IV. In an Aristocracy, or Democracy, the Power of making Peace shall be in the major part. In the one the Decrees of the Common Council, in the other those of the People being to be pronounced by those that by Custom are Authorized to do it, as we have said in another place. Therefore things thus agreed upon, shall be obligatory even upon those who dissented from them. As in *Livy*, *When it shall be once decreed, it must then be maintained as a good and profitable League by all, even those who before were against it.* Also *Dionysius Halicarnassensis*, *It must be obeyed as just, whatsoever the Majority has decreed.* And *Appian*, *All Men are obliged to obey a Decree, and no Excuse to be admitted against it.* As also *Pliny*, *What has pleased the most, must bind the rest.* But the Obligation of Peace is of advantage to those who agree to it.

IV. In an Aristocratical or Democratical State this Power is in the Majority.

V. 1. Now let us see what Things are subject to such an Agreement. Most Kings in our Days, holding their Kingdoms not as paternal Inheritances, but as Usufructuaries, have no Power by any Contract to alienate their Dominions in whole, or in part: Yea, and before they come to the Government, at what time the People are their Superiors; such Acts may by a publick Law for the future be rendered absolutely void and null; so as to what concerns that, it shall be no ways binding. And probably the People were inclined to it, lest otherwise, if as to that which is provided against the Action, should hold good against the Person

V. How an Empire or any part thereof, or the Goods of a Kingdom, may be alienated to obtain Peace.

Person contracting, the Subject's Goods might be liable to be taken for the Debt of the Prince, and so this Caution of not alienating the Kingdom would be in vain.

2. But that the whole Empire may be firmly alienated, the Consent of the whole Body of the People is required; which may be soon done by their Representatives, whom they call the Orders or States. And that any Part of the Empire may be firmly alienated a twofold Consent is required, both of the whole Body, and especially of that Part which is to be alienated, which cannot be divided from the Body to which it was united against its Will. But yet in Case of extreme Necessity, and otherwise unavoidable, that very Part may firmly convey the Government over themselves to another without the Consent of the People, because it is probable that was reserved, when that Society was instituted.

3. But in Patrimonial Kingdoms, nothing hinders, but that a King may alienate his Kingdoms. But it may happen to be so, that that King may not have Power to alienate any part of his Dominion, as if he received it as his Propriety upon Condition not to divide it. But as concerning those Things which are called the Goods of the Kingdom, they may become the King's Patrimony two ways, either separably, or inseparably with the Kingdom; if this latter way, they may be transferred, but not without the Kingdom; if the other, without it.

4. But those Kings, whose Kingdoms are not Patrimonial, can scarcely be allowed to alienate the Goods of the Kingdom, unless it plainly appear by some ancient Law or Custom, that it has been done.

VI. How far the People or Successors are obliged by a Peace made by the King.

VI. But we have elsewhere said, how far the People and the Successors may be bound by the Promise

Promise of a King; namely (e) as far as the Obligatory Power is comprehended in the Government; which should neither be drawn out to an Infinity, nor confined within too narrow Bounds, but be so far allowed, as probable Reason shall judge convenient. But it is a different thing, if a King be the absolute Lord of his Subjects, and his Rule be rather Despotical than Civil, as having brought them into Bondage by Conquest, or have obtained the Dominion over their Goods, but not their Persons, as *Pharaoh* had purchased all the Land of *Egypt*, or as others who receive Strangers into their Families. For in this Case, besides a Regal Right, there accrues another Right, which makes that justifiable, which a bare Regal Power of it self could not do.

VII. 1. This also is often disputed, what Right Kings have to dispose of the Goods of private Men to procure a Peace, who have no other Power over the Goods of their Subjects, than as they are Kings. I have already said, (f) that Subjects Goods are under the Supreme Power of the State, so that the State, or he that Acts the Sovereign in it, may make use of them, and even destroy or alienate them, not only upon an extreme necessity, which allows to private Persons a sort of a Right over other Men's Goods; but for the publick Benefit, which is ever preferable to any private Man's Interest, agreed to by the general Consent of those who first entred into Civil Society.

VII. The Goods of Subjects may in Peace be granted a-way for the publick Good but with Condition of repairing Losses.

VOL. III.

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1. To

(e) As far as the Obligatory Power is comprehended in the Government, which should neither be drawn out to an Infinity, nor confined within too narrow Bounds.] See *Ranking*, B. 1. claf. 3. cap. 5. num. 30. See also above, B. 2. cap. 14. § 7. and 12.

(f) That Subjects Goods are under the Supreme Power of the State.] *Gail*. 2. Obs. 57.

2. To which we must add, the whole State is obliged to repair the Damages, sustained by any Subject on that Account, out of the publick Stock; unto which he himself, who hath sustained the Loss, shall contribute upon Occasion. Neither shall the State be released from this Obligation, though at present it be not able to satisfy it, but whenever the State shall be in a Capacity, this dormant Obligation shall renew its Claim.

VIII. *What of Things already lost in War.*

VIII. Neither can I here generally admit the Opinion of *Ferdinandus Vasquius*, that a City is not obliged to repair such Damages caused by War, because the Right of War allows such Damages. For this Right of War, (as we have elsewhere explained it) purely respects other Nations, partly those that are at War among themselves, not Citizens among themselves, who since they are closely confederated, it is equitable, that they should esteem each Man's Loss, sustained on Account of the Confederacy, as common to all; yet this also may be constituted by the Civil Law, that no Action may be brought against such a City for Damages by War, in order to make every Man more careful to defend his own.

IX. *No Distinction here between Things got by the Law of Nations, and those by the Civil Law.*

IX. There are some that place a vast Difference between those Things which are the Subjects by the Law of Nations, and those which are theirs by the Civil Law; that they may allow the Prince a larger Right over these, even of taking them away without Cause or Satisfaction; but not so on the other: but falsely. For Dominion, from whatsoever first Cause it obtained, has always its proper Effects by the Law of Nature; so that it cannot be taken away, but for such Causes as are naturally inherent in Dominion it self, or such as arise from some Fact of the right Owner.

X. *What is done by a King, is taken by Foreigners to be for a publick Good.*

X. But this Care, that the Things of private Persons be not alienated, unless for a publick Benefit,

nefit, belongs to the King, and the Subjects, as that of repairing Damages to the City, and particular Persons. For to Strangers that contract with him the bare Fact of the Prince is sufficient, not only from the Presumption which the Dignity of his Person brings with it, but also from the Law of Nations, which allows the Goods of Subjects to stand obliged by the Fact of the King.

XI. 1. But as to the true Understanding of the Articles of Peace, we must here observe, what has been said before. The more Favour any Article contains, the more largely it should be taken; and the more Severity it has, the more strictly it should be understood. If we consider the bare Law of Nature, the greatest favour in that seems to be, that every one should enjoy his own. Which the *Greeks* express thus, ἕχασον ἑχεν τα ἑαυτῶν. Wherefore where the Meaning of the Articles are ambiguous, it should be taken in this Sense, that he that has the Justice of the War on his side, should obtain what he took up Arms for, and also recover his Costs and Damages, but not that he should get any thing farther by way of Punishment, for that would be very odious.

XI. A General Rule for the Interpreting Articles of Peace.

2. But because the bare acknowledging of a Wrong done seldom produces a solid Peace; therefore in Articles of Peace, such an Interpretation should be admitted, as may according to the Justice of War make the Balance even on both Sides; which is generally done two ways. Either (g) by an equal ordering of things as yet undecided by the Sword, according to the ancient Right (which are the words of *Menippus* in his Oration, wherein he treats of the several sorts of Leagues) or as the *Greeks* say, ἕχοντες ἃ ἕχουσιν, Every one keeping what he has.

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XII. 1. Of

(g) By an equal ordering of those as yet undecided by the Sword, according to the ancient Right.] See *Patura*, B. 5.

XII. In doubtful Cases, it is believed, that Things should remain as they are.

XII. 1. Of these two ways, in a doubtful Case, the latter is rather to be allowed, because it is more easie, and requires no Alteration. Hence *Tryphoninus* observes, that in Peace such Captives only are to return by *Postliminy*, as are comprehended in the Articles of Agreement, as I above observed, That *Fabre* did rightly correct it, and evinced by several Arguments. So Fugitives also are not to be restored, unless expressly stipulated. (b) For by the Law of War we receive Deserters, that is, by the Law of War we are allowed to entertain, and Lift among our own Troops such as quit their own Party. All other Things by such an Agreement continue his, who is possessed of them.

2. But that Word *possess'd* is taken Civilly, not Naturally; for in War a Possession in Fact is sufficient, neither is any other required. Lands I have already said, are then possessed, when they are inclosed by some Fortifications; for such as are only encamped upon for a time, are not here respected. *Demosthenes* in his Oration for *Ctesiphon*, says, that *Philip* made haste to possess all the Places he could possibly, knowing well that at the concluding of the Peace, he should keep all that he had in his Possession. But Incorporeal Things cannot be kept, but either by the Things to which they adhere, (as the Services of Manors) or by the Persons whose they are, that they may not be made use of in a Country that is yet their Enemies.

XIII. What if it should be agreed, that Things should be restored to the same Condition, that they were in before the War began?

XIII. In that other kind of Agreement, whereby the Possession of Things not yet decided by War, is to be restored, we must observe, that the last Possession immediately before the War is here meant;

(b) For by the Law of War we receive Deserters.] Above in this Book, cap. 1. towards the end, this also used to be agreed on in Peace, that Deserters be not entertained. See the Peace of *Justinian* with *Chosroes* in *Menander Protektor*.

meant; yet so as those private Persons that were ejected, may be allowed the Liberty to Appeal to the Judge, either for an Injunction or Vindication.

XIV. But if a Free People shall Voluntarily submit themselves to either Party engaged in War, this Article of Restitution cannot reach them; because it only relates to those Things which were done by Force, Fear, or otherwise by a Treachery not allowable but in an Enemy. Thus tho' the Peace were concluded among the Greeks, the *Thebans* yet (i) retained *Platea*, pretending That they were possess'd of it, not by Force nor Treachery, but by the voluntary Surrender of the Inhabitants. And by the same Right was *Nisæa* retained by the *Athenians*. *T. Quinctius* used the same Distinction against the *Ætolians*, replying, That was the Law of Cities taken by Force, but the Cities of Thessaly freely submitted themselves unto the Roman Dominion.

XIV. Then they who were before Free, and had Voluntarily submitted themselves, are not to be restored.

XV. If nothing else be agreed upon, yet this is to be supposed in every Peace, that no Action shall be commenced for Damages done in War; which also is to be understood of those done to private Persons, these being also the Effects of War. For in a doubtful Cause, it is to be imagined, that neither Party will be willing to own themselves Guilty of Injustice.

XV. Damages by War if in doubt, are supposed to be forgiven.

XVI. Yet those Debts, which were due to private Persons at the beginning of the War, are not to be accounted forgiven, for these were not contracted by the Right of War, but only forbidden to be demanded in time of War; therefore the Impediment being removed, i. e. the War

XVI. But not those before the War due to private Persons.

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ended,

(i) They retained *Platea*.] This Passage is in *Thucydides*, 5. And another like it before, B. 3. Let not *Platea* be restored, since the Citizens Voluntarily surrendered themselves.

ended, they retain their full Force. For tho' it ought not to be believed, that what was a Man's Right before the War, may be easily taken from him, (for for this Cause chiefly (as *Cicero* well observes) Commonwealths and Cities were first constituted, that every one might keep his own) but this must first be understood of that Right only, which is derived from the Inequality of Things.

XVII. Punishments also before the War publicly due, if in doubt, are believed to be forgiven.

XVII. (k) It is not so concerning the Right to Punishment; for this Right, as far as it concerns those Kings, or People, is for this Reason presumed to be remitted; lest the Peace should not be compleat, if it left any old Grudges behind, which might in time renew the War. Wherefore unknown Injuries are usually comprehended in general Terms, as the Action of the *Carthaginians* in drowning some *Roman* Merchants, was remitted by the *Romans*, before it was discovered to them, as *Appian* relates. Κολίσαι διαλλαγὰς ἐν αἷς ἔδεν ἐσιν ἑγκοτον, ἔδ' ἐ μνησικαχον, says *Dionysius Halicarnassensis*, *Those are the best Reconciliations, which leave behind nothing of Anger, or Ill-will.* And also *Isocrates*, *After a Peace is concluded, it is base to revenge former Injuries.*

XVIII. What of the Right of Private Persons to exact Punishment.

XVIII. There is not the same Reason that private Men should remit this Right of demanding Punishment, because these may without War be judicially required; but since this Right is not so properly ours, as that which arises from Inequality, and exacting of Punishment always implies some Hatred, a slight Examination of the Words may be enough to make us think, that this always was designed to be forgiven.

XIX. That Right, which before the War was publicly claimed, but disputed, is easily presumed to be forgiven.

XIX. But whereas we have said, that the Right, which we had before the War, should not easily

(k) It is not so concerning the Right to Punish.] *Gaid. de Arrest. c. 14. n. 7.*

easily be thought to be remitted, this indeed holds very true in the Right of private Men. But as to the Right of Kings and Nations, a Remission may be more easily granted, if the words will but afford any room for probable Conjectures; but especially if the Right in debate were not clear, but in dispute. For it is generous to believe that to be done, that the Seeds of a new War may be entirely pulled up. The same *Dionysius Halicarnassensis* well observes, *We are not so much to endeavour to patch up a broken Friendship for the present, as to take Care to prevent our being involved again in the same War. For we are met here not to remove the Miseries of War, but entirely to take them away*; which last Words are almost taken from *Isocrates*, in his Oration concerning Peace.

XX. Whatsoever is taken away after the Peace is absolutely concluded, is to be restored, for from that time the Right of War immediately ceased.

XXI. But of those Articles which relate to the Restitution of Things taken in War, those in the first place may be more largely interpreted, that are mutual, than those that concern only one Party. Next, those relating to Men are to be allowed more favour, than those that respect Things; and even among those that relate to Things, they that concern Lands should be more favourably construed, than those that respect Moveables; and also among these, they that are in Possession of the State, more than those of private Persons. And again, among those in the Possession of private Men, they are to be taken in a larger Sense, that are possessed under a gainful, than those under a chargeable Title, as Things bought with Money, and those held in Dowry by Marriage.

XXII. To whom any thing is granted by Articles of Peace, to him are also all the Profits allowed from the time of that Grant, but not before; as *Augustus Caesar* well argued against *Sextus Pompeius*

XX. Things taken after Peace to be restored.

XXI. Some Rules, of Agreement whereby Things taken in War are to be restored.

XXII. Fruits, &c. to be restored.

Pompeius, who having *Peloponnesus* granted to him, would have also had all the Tributes that were in Arrears for some Years past, before the time of that Grant.

XXIII. Of the Names of Countries.

XXIII. (1) The Names of Countries are to be taken according to the present use, not so much of the common People, as of the Learned, for such Affairs use to be managed by the Learned only.

XXIV. Reference to some former Agreements.

XXIV. These Rules are of frequent use, as often as reference is had to some Precedent, or Ancient Agreement, so often the Qualities or Conditions express'd in the former Covenant are presumed to be repeated, and he shall be reputed to have fulfilled his Agreement, who was willing to have done it, if he had not been prevented by another, with whom he was in dispute.

XXV. Of Delay.

XXV. But whereas some affirm, that an Excuse is allowable for some delay in the Performance, (m) this holds not true, unless caused by an unforeseen Necessity. For it is no wonder, that some of our Canons seem favourable to such Excuses, when it is their design to exhort Christians to such things as are agreeable to mutual Charity. But in this Question of the interpreting Agreements, we do not enquire what is best, nor what Piety or Religion demands, but what may by Law be forced to. All which is ruled by the external Law.

XXVI. In a doubtful Interpretation, it is to be given against him that gives the Law.

XXVI. But where the Meaning is doubtful, the Interpretation ought to be rather made against him

(1) The Names of Countries are to be taken according to the present use.] See Guicciardin, B. 5.

(m) This holds not true, unless caused by an unforeseen Necessity.] See Albertus Argemineus.

him (n) who imposes the Conditions, as generally the more weighty. *The Power is in him that gives, says Hannibal, not in him that desires Conditions of Peace.* As the Interpretation ought to be against the Seller, for he can only blame himself, for not fully explaining himself; but the other receiving Conditions in words capable of divers Senses, has a Right to take the Offers in the Sense most favourable to himself; agreeable to which is that of *Aristotle, When Friendship is on the account of Interest, the Profit of the Receiver ought to be the Measure.*

XXVII. It is also a daily Dispute, when a Peace may be said to be broken, which the Greeks call *παράπνοσημα*, *The Solution of Peace*; for it is not directly the same thing, to give a new occasion of War, and to break a Peace. But there is a great difference between them, as well to demand Punishment from the Offender, as to defend the Faith of the offended in other things. A Peace then may be broke three ways, either by doing what is contrary to all Peace, or against that which is expressly mentioned in that Peace, or against that which is to be understood from the nature of every Peace.

XXVIII. First, it may be done, when that is acted which is contrary to all Peace; as when we are invaded in a hostile manner, when there is no new cause of War, which if it may be alledged with any probability, it were better to suppose it an act of Injustice without Treachery than with it.

It

XXVII.

Distinctions to be made between new occasions of War, and breaking the Peace.

XXVIII.

How a Peace may be broke by doing contrary to what is supposed to be in every Peace.

(n) *Who imposes the Conditions.*] *Plautus in Persa. They are your Goods, do you set the Price.* In this case of War, he prescribes first that is more powerful; but in demanding Conditions, the weaker speaks first. And *Plutarch in the Life of Sylla. They ought to speak first, who stand in need of Peace; it is enough for the Conqueror to be silent.*

It seems unnecessary to mention that of *Thucydides* (o) *Not they who repel Force by Force, but they who first offer the Violence, are the Breakers of the Peace.* This being granted, we must next see, who are the Invaded, and who by invading break the Peace.

XXIX.

What if we
be invaded
by Allies.

XXIX. I find some are of Opinion, that if the Invaders be but their Allies, the Peace is broken. I do not deny but such a Contract may be made, not properly, that one Man should be liable to Punishment for the Fact of another; but that Peace seemed not to be fully made, but on condition, partly *Potestative*, partly *Casual*. But it is scarce credible, that such a Peace should be made, unless it manifestly appear; for it is irregular, and inconsistent with the Design of those that make Peace. Therefore they that thus invade, without the Assistance of others, shall be adjudged the Breakers of the Peace, and it shall be lawful to make War on them, not on others; contrary to which, the *Thebans* sometimes pleaded against the Associates of the *Lacedemonians*.

XXX.

What if by
Subjects,
and how
their Act
may be
judged, or
approved.

XXX. But if Subjects make a hostile Invasion without publick Order, we must then see this

A&

(o) *Not they who repel Force by Force, but they who first offer the Violence, are the Breakers of the Peace.* See *Ammianus Marcellinus*, in the beginning of his 29th Book, who thus speaks of the Romans, *They on purpose gave way, lest they should seem to be the first Aggressors, and be thought the Breakers of the League; but afterwards upon urgent Necessity, they engaged in Battle.* And *Procopius* in the Oration of *Armenius* to *Chosroes*, *Persic. 2. They break the Peace, not who are first in Arms, but who during a League are found to be treacherous to others.* And in the same Author, *Vandal 2. The Moors alledge, They break the League of Peace, not they who being injured and publicly complaining thereof, (tho' to no purpose) betake themselves to others; but they, who wrong those, whom they pretend to own for Confederates: And they make not God their Enemy who taking with them only their own, fly for Refuge unto others; but they who by invading other Mens Possessions, force them to a War in their own Defence.*

Act of private Men be publickly approved of; to which three things are required, 1. The Knowledge of the Fact. 2. A Power to punish. And 3. A neglect in the Person authorized to do it; as you may easily gather from what has been said before. 1. Their Knowledge may be proved, if the Fact be publick, and declared. 2. A Power is presumed, unless there be a Rebellion. 3. A Neglect may appear, if the Time be elapsed, which every City generally takes to punish Offenders. And such a Neglect is equivalent to a publick Decree. Neither can what *Agrippa* says in *Josephus* be otherwise understood, *That he should look upon the Parthian King to have broke the Peace, if his Subjects marched in Arms against the Romans.*

XXXI. Another Query is often made, whether it be all one, if Subjects take up Arms, not by themselves, but fight under others engaged in War. The *Cerites* in *Livy* fully clear themselves, by saying, their Subjects took up Arms without any publick Order. The same was the Defence of the *Rhodians*. But it is more true, that neither this should be allowed, unless it appear by probable Arguments, that it has been otherwise practised, as it is sometimes now used amongst us, in imitation of the old *Ætolians*, who accounted it lawful, ἀγαιν λαφύρον ὑπὸ λαφύροις, (p) *To prey on all sides.* Which Custom (q) *Polybius* says was so powerful, *That tho' they were not at War themselves, but only others, their Friends, or Allies, yet it was lawful for the Ætolians, without any publick Order, to fight on both sides, and to prey on either Party.*
And

XXXI.
What if
Subjects
serve under
another
Prince?

(p) *To prey on all sides.*] *Plautus* in *Truculentus*, de prada pradam capio, I plunder the Plunderer.

(q) *Polybius.*] See him also in *Excerpt.*

And *Livy* gives the same account of them. They suffer their Youth, (r) but without any publick Commission, to fight against their Allies, and often both Parties have *Ætolian Auxiliaries* at the same time. Thus the *Hetrurians* of old denied to assist the *Veientes*, but yet did not hinder their Youth from going of their own voluntary Will into the Service.

XXXII.
What if
Subjects be
invaded,
explained
by Distin-
ction.

XXXII. 1. Again, the Peace is said to be broken, not only when the whole Body of a State, but if any of the Subjects be forcibly invaded, unless upon occasion of some new Cause of War. For Peace is made to the Intent that Subjects might live in safety on both sides. Yet if there be even a new Cause of War, yet by Peace it shall be lawful for every one to defend himself, and what is his. For it is natural (as *Cassius* says) to repel Force by Force. Therefore this Right cannot easily be thought to be renounced amongst Equals. But it shall not be lawful to revenge ones self, or by Force to recover what has been taken away, unless Judgment be first denied us. For this may admit of some delay, but that of none.

2. (s) But if Subjects make it their constant Practice to commit Outrages contrary to the Law of Nature, and it appear they do it wholly against the Will of their Rulers, and no Court of Judicature can reach them, such as are Pirates and Robbers; we may both recover our Losses from them, and avenge our selves on them by force of Arms, as if they were surrendered to us. But to assault others

(r) Without any publick Commission.] *Agathias* relates the same of the *Hunns*, *Sabirs* in his own Days. B. 4.

(s) But if Subjects make it their constant Practice to commit Outrages.] Thus *Augustus* gave Judgment for *Herod* against *Syllaus*, *Josephus*, 16. 16.

others on that pretence, is directly against the Peace.

XXXIII. 1. (t) A forceable Invasion of our Allies also breaks the Peace, but it must be those that are comprehended in the Peace, as I have already shewed in the case of the *Saguntines*. This the *Corinthians* alledge in *Xenophon*, in his 6th Book of the *Greek History*, *We have all of us sworn to all of you*. But tho' those Allies do not covenant for themselves, but others do it for them, it is still the same thing, provided it fully appears that they have ratified it; but as long as it is not certainly known that they have done it, they are reputed as Enemies.

2. But the Case is different of the other Allies, viz. not comprehended, our Kinsmen, and Relations, who are neither our Subjects, nor nominated; neither can an Assault upon them amount to the breach of Peace. Neither does it follow, (as we have said before) that War may not be made on their account, but that War must be grounded upon a new Cause given.

XXXIV. The Peace is likewise broken, (as I have said already) by doing contrary to what is expressed in the Peace; where by doing is likewise comprehended, not doing what we ought to do, and when we should do it.

XXXV. Neither can I here admit of any distinction between the Articles of Peace, as if some were of greater Concern than others: For whatever is inserted in the Articles, is thought great and worthy enough to be observed. But Goodness, especially among Christians, will easily forgive

XXXIII.
What of Allies? with a Distinction.

XXXIV.
How a Peace may be broken by doing contrary to what is expressed in the Peace.

XXXV.
Whether any distinction to be made between the Articles of Peace?

(t) *A forcible Invasion of our Allies also breaks the Peace.* [Thuanus, B. 65. in the Year 1578. There is also something pertinent to this in *Harau*, Tome 2. *Histor. Brabant*, in the Year 1556.

give small Faults, particularly if they be repented of; as *Seneca* speaks,

Quem paenitet peccasse, paene est Innocens.

Who repents of his Crime, is almost innocent.

But to secure the Peace the better, it would be well done (u) to add to the Articles of less concern, this Clause, That if any of them should be broken, it should not arise so high as to break the Peace, but they should be first put to Arbitration, before they had recourse to Arms, which *Thucydides* Records was in the *Peloponnesian* League.

XXXVI.

What if some Punishment be added.

XXXVI. And I am clearly of Opinion, that the same may be done, (x) provided some special Punishment be appointed; not that I am ignorant, that such an Agreement may be made, that it shall be in the injured Persons Choice, either to accept of Punishment, or make void the Peace. But that the Nature of the Injury may be such, as to require rather that, which I mentioned. This is very plain, and what I have said before, and what I have proved by the Authority of History, that he does not break the Peace, who being first failed, fulfill not his own Promise, for his Obligation was Conditional.

XXXVI.

What if hindered by absolute Necessity?

XXXVII. But if an Absolute Necessity occasion the Non-Performance of the Agreement, as if the Thing promised be lost, or taken away, or the

(u) To add to the Articles of less concern this Clause, That if any of them should be broken, it should not arise so high as to break the Peace] See a remarkable Instance in the Peace of *Justinian*, between *Justinian* and *Chosroes*, as it is in *Menander Protector*.

(x) Provided some special Punishment be appointed.] As in the Agreements of the *Goths* with the *French*. See *Procopius*, *Goth.* 1.

the doing of it be by some Means or other render it impossible, the Peace shall not then be looked upon as broken. For (as I have said already) Peace does not use to depend upon a Casual Condition; but the other Party shall have his Choice whether he had rather wait for the Performance of the Promise, if there be any hopes of a possibility of its being done, tho' late, or receive the full Value of it, or be discharged from any mutual Engagements answerable to this Article, or thought Equivalent to it.

XXXVIII. It is certainly an Argument of great Sincerity in the Innocent Person to preserve the Peace, even with those that have broke their Faith; as *Scipio* did with the *Carthaginians*, tho' after many of their Perfidious Actions: Because no Man, by doing contrary to his Obligation, can thereby discharge himself from it. For tho' it be expressed, that by such a Fact the Peace shall be reputed as broken, yet this is to be understood only for the Advantage of the Innocent, if he thinks fit to make use of it.

XXXIX. Lastly, We have said, that the Peace may be broken by doing what is contradictory to the Special Nature of Peace.

XL. 1. Thus those things that are done contrary to Friendship, do break that Peace which was contracted under the Notion of Friendship; for what the Duty of Friendship alone may require from others, ought also here to be performed by the Right of Covenant. And to this (tho' not to every Peace, for there are some not on the same Account of Friendship, as *Pomponius* observes,) we may refer many of those Debates, which Civilians hold concerning Injuries and Affronts done without force of Arms; and especially that of *Tully*, *If any thing be committed after Peace made, it shall not be accounted a Neglect, but a Breach, and not imputed*

XXXVIII.

The Peace shall stand firm, if the injured Person be willing to it.

XXXIX.

How a Peace may be broken, by doing what is contrary to the Nature of every Peace.

XL. *What comes under the Notion of Friendship.*

to

to Imprudence, but Perfidiousness; and even here also we are not to judge of it invidiously.

2. Therefore an Injury done to an Ally, or a Subject, shall not be imputed to him with whom we have made Peace, unless it very plainly appears that it was done by his Procurement: Which Natural Equity the *Romans* observe towards Servants that have been cruelly handled; and Adultery and Ravishment shall be imputed rather to Lust than Hatred: And the invading another Man's Property is reputed rather an Act of Covetousness than of Treachery.

3. Cruel Threatnings, without upon some new Cause given, are inconsistent with Friendship; and hereto I will refer Forts built on the Frontiers, not so much for Defence as Offence, and an unusual raising of Forces, if there be just and apparent Reasons to think that they are prepared against him with whom we have made Peace.

XLI. Whether to entertain Subjects and Exiles be contrary to Friendship.

XLI. 1. (y) To receive particular Persons as are willing to remove from one Prince's Territories into anothers, is no Breach of Friendship; for this Liberty is not only Natural, but Kind (as we have said elsewhere). In the same place I shall rank the Enter-

(y) To receive particular Persons as are willing to remove from one Prince's Territories to anothers, is no breach of Friendship.] Solon would suffer no Man to be enrolled among the Citizens, but those who were for ever banished their own Country, or that came to Athens with all their Family to settle, and exercise some way of Trade. And *Perseus* in *Appian* in *Excerpt. Legat. Num.* 25. I have done this by the common Right of Mankind; as ye also entertain those that are banished from other Places. This common Right uses to be confirmed and bound by Covenants. See the Peace of *Antiochus* in *Polybius Excerpt. Legat.* N. 35. and in *Livy*; and the Peace between the *Romans* and *Persians* in *Menander Protector*. Simlar of the Covenants of the *Swiss Cantons* among themselves. The People of *Arados*, when the Kings of *Syria* were quarrelling among themselves obtained that they might receive the Fugitives, but not to let them go. As *Strabo* witnesses, 16.

Entertainment given to Exiles: For as I have before proved out of *Euripides*, the State has no Right over those whom they have banished. *Perseus* argues well in *Livy*, *What benefit is it for one to be banished, if there were no Place allowed for his Refuge?* And *Aristides* in his second *Leuctrick* calls, *ἐξαιτῶν τὴν ἐκπεσόντας κοινὸν ἀπασιν ἀνθρώποις*, *To receive the banished, a Right common to all Mankind.*

2. But (z) we have already proved, that it is not lawful to receive whole Towns, or any great Multitudes, who made an entire part of a City. We have mentioned, that the like hath been introduced among some People by the Law of Nations, concerning those that have been made Slaves by the Chance of War; but concerning the delivering up of such who are not banished, but fly from Justice, I have treated in another Place.

XLII. To decide a War by Lots is not always lawful, but only then, when we have a full Propriety in the thing disputed for: For Cities are to be defended in the Lives, Chastity, and such like of the People; and a King is more strictly obliged to consult the General Safety of the State, than to omit those means which are most natural to his own, and others Security. But yet, if he that is unjustly assaulted, shall upon due Examination find himself too weak to make any considerable Resistance, he may reasonably refer his Case to the Chance, that by an uncertain he may escape a certain Danger, which of the two Evils is the least.

XLIII.
How War
may be ended
by Lots.

VOL. III.

X

XLIII.

(z) *We have already proved, that it is not lawful to receive whole Towns, or any great Multitudes, who made an entire part of a City.]*

B. 2. Cap. 5. §. 24. See also *Bizarus*, B. 12.

XLIII.

How by a
set Combat,
and whether
it be lawful.

XLIII. 1. Here follows a Question much controverted, viz. whether it may be lawful to decide a War by a Combat of one of each side, as that of *Aeneas* and *Turnus*, *Menelaus* and *Paris*; or between two of either Party, as that between the *Ætolians* and *Eleans*; or between three of a side, as between the *Roman Horatii*, and the *Alban Curiatii*; or between three hundred on each side, as that between the *Lacedemonians* and *Argives*.

2. If we only respect the External Right of Nations, no doubt but such Combats are lawful, for that Law gives a Man leave to destroy his Enemy how he can; but if the Opinion of the old *Greeks*, *Romans*, and other Nations, were right, that every Man had an Absolute Power over his own Life, then those Combats are reconcileable to Internal Justice. But we have often said, that this Opinion is repugnant to Right Reason and God's Commands. We have elsewhere proved by Reason, and the Authority of Holy Scriptures, that he offends against Charity who kills a Man, for those things which he can well spare. To which we shall add, that he who sets so small a value upon his Life, which God has given him as a great Blessing, sins against God and his own Soul. If the thing disputed for be worthy of a War, as the Preservation of the Lives of many Innocent Persons, we ought to endeavour it to the utmost of our Power; but to make use of a set Combat, purely as the Tryal of a good Cause, or as an Instrument of Divine Judgment, is vain, and far from true Piety.

3. There is but one thing that can render such a Combat Just and Pious, and that but on one side, when otherwise it is highly probable that he who prosecutes the unjust Cause should be the Conqueror, and thereby cause the Destruction of many Innocents; he cannot then be any ways blamed.

blamed, who undertakes a Combat on this Account, wherein he has any probable hopes of Success. But this is also true, that many things which are not rightly done, may be by others, tho' not really approved, yet permitted, in order to prevent greater Mischiefs that could not otherwise be avoided; as in many Places, extorting Usury and professed Whores are tolerated.

4. What therefore we have said before, when we treated of preventing a War, if two Persons that Dispute about a Kingdom are willing to try it by single Combat, the People may safely allow it, that greater Miseries (otherwise unavoidable) may be prevented: We may say the same, when it is to conclude a War, (a) as *Cyrus* challenged the *Assyrian* King. And *Metius* in *Dionysius Halicarnassensis* declares, that it is not unreasonable, if the Dispute be not concerning the Power and Dignity of the Nation, but of the Princes themselves, (b) that they only should decide the Controversie by their own Swords. Thus we read, that the Emperor (c) *Heraclius* fought a single Combat with *Chosroes*, Son to the King of *Persia*.

X 2

XLIV.

(a) *As Cyrus challenged the Assyrian King.*] And long before *Hyllus* did *Eurystheus*. See *Euripides* in *Heraclida*.

(b) *That the Princes themselves only should decide the Controversie by their own Swords.*] Thus the *Adrianopolitans* answered *Mahomet*, concerning him and *Musa Zelebes*, *Leunclav. B. 1.* So *Cunibers* King of the *Lombards* challenged *Alachis*, *Paul. Warnefred. B. 5.* So *Pharnacus* offered to fight with *Sanromatus* about the *Fortress* of *Cherso*, that the Multitude should not be exposed to Dangers on their Account. *Constantine Porphyrogenneta* relates it in the Chapter *de Castro Chersonis*. See an Instance of a single Combat about a Kingdom, *Pontanus Histor. Danni.* and what *Historians* record of the *Challenges* between the Emperor *Charles V.* and *Francis I.* King of *France*.

(c) *Heraclius.*] See *Aymonius B. 4. Cap. 21.* and *Fredogarius, Cap. 64.*

XLIV. Whether the fact of the King does here oblige the People.

XLIV. But they who thus refer their Cause to the Tryal of a Combat, may lose their own Right, if ever they had any, to the Kingdom disputed for. Neither can they make over their Right to another, who has none of his own, to those Kingdoms which are not Patrimonial. Therefore to make the Agreement firm, there is a Necessity to have the Consent of the People, and of any yet born, that pretend Right to the Succession. And the Consent of the Lord or Superior, in Estates which owe Service and Acknowledgments.

XLV. Who is to be judged the Conqueror.

XLV. 1. Often in such Combats it is disputed (d) which is the Conqueror: They cannot be reputed Conquered, unless the whole Party on one side be slain, or put to flight. (e) So in *Livy*, he that retreats within his own Borders, or into a Fortified Town, is to be esteemed Vanquished.

2. Among those three famous Historians *Herodotus*, *Thucydides* and *Polybius*, three Questions are proposed concerning Victory; the first of which concerns this of Set Combats; but he that rightly considers the matter will find, that in all those Combats neither Party had a compleat Victory. For the *Argives* were not put to flight by *Othryades*, but marched off in the Night, supposing themselves Conquerors, and so declaring to their Countrymen. Neither did the *Corcyreans* defeat the *Co-*

rin-

(d) Which is the Conqueror.] *Emius*.

Qui vicit, non est victor, nisi victus fatetur.

He is not fairly thought to win the Field,
Unless the vanquished the Conquest yield.

See *Scaliger* upon that of *Testus herbam, do I yield*.

(e) So in *Livy*, he that retreats within his own Borders, or into a fortified Town, is to be esteemed Vanquished.] And in *Guicciardina*, B. 2.

inthians; but they having fought valiantly, seeing a strong Fleet of the *Athenians* near, without hazarding an Engagement with them, retreated in good Order. But *Philip*, the *Macedonian*, having taken a Ship of *Attalus*, forsaken by her Men, but had not routed the whole Fleet: Yet (as *Polybius* observes) rather behaved himself like a Conqueror, than really thought himself so.

3. But those things, as gathering the Spoils, (f) giving leave to bury the Dead, and offering Battle a second time; * which both in the above-mentioned Authors, and in *Livy*, you may find set down as Tokens of Victory, prove nothing of themselves; but as they may be attended with other Indications of the Enemy's flight. And certainly, he that first quits his Ground may probably be thought to be in a running Posture; but where there are no positive Signs of Victory, the Case is just as it was before the Battle, and so they must either pursue the War, or come to a new Agreement.

XLVI. 1. *Proculus* tells us, that there are two sorts of Arbitrations, one whereof he makes so Absolute, that its Sentence must be obeyed, whether Just or Unjust; which he says is observed, when by Engagement Reference is had to Arbitration. And the other, when both Parties are willing to refer their Cause to the Judgment of a third indifferent Person. Of which we have an Example in the Answer of *Celsus*, If a Slave made free shall

XLVI:
How War
may be ended
by Arbitration; and
here Arbitration
is to be understood
without Appeal.

X 3

swear

(f) Giving leave to bury the Dead.] *Plutarch* in the Life of *Agefilas*, Having given the Enemies leave, upon their Request, to bury their Dead, and thereby gained a Testimony of the Victory he went to *Delphos*. The same Author also in the Life of *Nicias*, Tho' by Law and Custom he who craves leave to bury his Dead, is esteemed to disclaim the Victory, and he that requested this Leave, had no Right to erect Trephies.

swear (says he) *to do what Services his Patron shall require of him, the Demands of his Master shall be no farther Obligatory than consists with Justice.* But this Interpretation of an Oath, tho' it may have been allowed by the *Roman* Laws, yet it is not agreeable to the plain Sense of the Words simply taken; but this holds very true, that the Word *Arbitrator* may be taken in both Senses, either as a Moderator only, such as were the *Athenians* between the *Rhodians* and *Demetrius*; or for an Absolute Judge, whose Decree must be obeyed. And it is in this Sense that we here take it; as also we have done before, when we treated of the Means to prevent a War.

2. Tho' even against such Arbitrators to whose Judgment both Parties have promised to stand, it may be provided by the Civil Law, as in some Places it is, to appeal from it, and exhibit Bills of Complaint; (g) yet this cannot be between Kings and Nations. For here can be no Superior Power which may either hinder or disannul the Obligation; so that their Sentence must stand, whether Just or Unjust; to which we may rightly apply that of *Pliny*, *Every Man makes him the Supreme Judge of his own Cause, whom he has chosen Umpire.* For it is one thing to treat of the Duty of an Arbitrator, and another of the Obligation of those who have engaged by Promise to stand to their Arbitration.

XLVII.
*Arbitrators
in doubtful
Cases bound
to the Law.*

XLVII. We must consider in the Duty of an Arbitrator, whether he be chose under the Notion

(g) *Yet this cannot be between Kings and Nations.* Mariana, B. 29. 15. Bembo B. 4. we read of several Treaties of Peace made by Arbitrators in the Polish History of Cromer. B. 10. 16. 18. 21. 24. 27. 28. You have also in the Danish History of Pontanus, B. 2. compare them with what we have said above, B. 2. Cap. 23. §. 18.

of a Judge, or as a Moderator, which *Seneca* looked upon as the proper Office of an Arbitrator, where he tells us, *A good Cause had better be referred to a Judge, than an Arbitrator, because the Judge has a Constant Rule and Orders to proceed by, which he must not transgress; but the other being freed from the Obligations of the Law, is at Liberty to give his Judgment not according to Law and strict Justice, but as Humanity and Pity shall direct.* And *Aristotle* reckons it *ἐπιεικὲς*, the Duty of an honest Man, *εἰς διαλλαμᾶλλον ἢ εἰς δίκην βέβηκεν ἵεναι*, rather to go to an Arbitrator than a Judge; giving this Reason for it, *ὅτι διαλλαγῆς τὸ ἐπιεικὲς ὁρᾷ ὅτι δίκης, ἢ νόμον. καὶ τὰς ἐνεκα διαλλαγῆς εὐρίθην, ὅπως τὸ ἐπιεικὲς ἰσχύῃ*, for an Arbitrator respects that which is Righteous, the Judge that which is Legal; and for that Reason an Arbitrator is chose, that Equity may prevail. For Righteousness (or Equity) in this place does not properly signifie (as elsewhere) that part of Justice, which expounds the Letter of the Law nearest the intent of the Law-maker, (for even this is the Judge's Charge) but every thing which is better done than not done, tho' not according to the strict Rules of Justice properly so called. But such Arbitrators, as they are frequent among private Persons, that are Subjects to the same State; and are highly commended, especially to us Christians by the Apostle *St. Paul*, *1 Cor. vi.* so in doubtful Cases so large a Power is not supposed to be granted them. For in such as are doubtful, we are to follow that which has the least doubt in it; but especially it is to be observed between Sovereign Princes, who having no common Judge, are presumed to tie up the Arbitrator to those strict Rules which Judges are generally confined to.

XLVIII.
Arbitrators
ought not to
judge of
Possessions.

XLVIII. But this is to be observed, that Arbitrators chosen by a People, or Sovereign Power, (b) are to give Sentence of the Principal Matter, but not of the Possession, for Judgments of Possessions belong to the Civil Law: By the Law of Nations Dominion follows the Right of Possession, therefore till the Cause is tried, no Innovation is to be made, both to avoid Prejudice, as also because the Recovery of those things is difficult. *Livy* in his History of the Arbitrators between the Carthaginians and Masinissa says, *Embassadors do not change the Right of Possession.*

XLIX.
How far
the force of
a pure Sur-
render ex-
tends,

XLIX. 1. There is also an Assumption of an Arbitrator, when a Man yields himself up to the Arbitration of his Enemy, which is a pure Surrender, making the Yields a perfect Slave, and gives a Sovereign Power to him that receives the Surrender. The Greeks call it ἐπιτρέπειν τὰ καθ' αὐτόν. Thus the *Ætolians* were asked in *Livy*, whether they would submit themselves to the Judgment of the *Romans*. This was the Advice of *L. Cornelius Lentulus*, as related by *Appian* about the end of the second *Punick War*, concerning the Affairs of the Carthaginians: *Let the Carthaginians (says he) submit themselves to our Judgment, as the conquered use to do, and as others have done formerly, then we shall see how thankful they will be to us for any Benefit received, for they must not pretend to call it a League, for it is very different from it: For if we should make a League with them, they will always have some Pretence to break it, alledging, that they had been wronged in some part of it. For since many things are capable of a double Interpretation, there will always remain*

room

(b) To give Sentence of the principal Matter, but not of the Possession.] The Duke of Savoy said thus in the Controversie of *Saluzzana*. See *Serranus* in the Life of *Henry IV.*

room for a Dispute; but when we shall have disarmed them as Persons that have surrendered, we shall then have their Bodies in our Power; then at last they will be sensible, that they have nothing properly their own, and lose their Courage; and whatsoever they shall receive from us, they will look upon as of meer Grace and Favour.

2. But here we must also distinguish, what the Vanquished ought to suffer, and what the Conqueror by Right of Conquest may do, and lastly what may most become him. The Conquered having yielded himself, must suffer any thing at the Will of his Conqueror, as being now enslaved; and if we respect the Eternal Right of War, they have nothing but what may be taken from them, their very Lives and Personal Liberty, much more their Goods, whether Publick, or belonging to Private Persons. *Livy* tells us in another place, *That the Ætolians having simply yielded up themselves, were afraid of Corporal Punishment.* We have said in another place, *When all things are surrendered to the Conqueror, it is absolutely at his Pleasure to take away what he has a mind, and to punish how and whom he pleases.* To this agrees that of *Livy*. It was the Ancient Custom of the Romans, when they dealt with those with whom they were joined in Friendship, either by League, or equal Laws, not to exercise a Sovereign Power over them, as being at Peace with them, till they had first delivered up to them all things both Divine and Human, had received their Hostages, taken away their Armies, and garrisoned their Towns. And even sometimes those that yielded themselves might be killed, as we have shewed in another place.

L. 1. But the Conqueror, that he may do nothing unjustly, ought first to take care that no Man be killed, unless for some Capital Crime; so also, that no Man's Goods be taken away, unless by way of
just

just Punishment. (i) But in this Case, as far as his own Security will permit it, it is Honourable (to a Conqueror) to shew Clemency and Liberality, and sometimes even necessary, according as Circumstances shall require.

2. Admirable are the Conclusions of those Wars which are finished with a General, as I have said in another place. Thus pleaded *Nicolaus the Syracusan* in *Diodorus*, *They surrendered themselves up with their Arms, trusting to the Mercy of the Conquerors; it would then be an eternal Shame, that they should be deceived in their Opinion of our Clemency.* And again, *What Grecian ever condemned them to barbarous Punishment, who yielded to the Mercy of the Conqueror?* And thus *Octavius Cæsar* in *Appian* speaks to *L. Antonius*, coming to surrender himself, *If you had come purely to have made a Peace, you should have found me a Conqueror highly incensed at your Actions; but now you come to Surrender your self, your Friends, and your Army to our Discretion, you have disarmed my Anger, and taken from me the Power of imposing severe Conditions upon you; for upon considering what you ought to suffer, and I to grant, I shall prefer my Honour to Revenge.*

3. We often meet in *Roman Histories* with these Expressions, *Tradere se in fidem*, *To yield themselves to the Faith.* *Tradere in fidem & Clementiam*, *To yield to the Faith and Clemency.* So in the 37th Book of *Livy*, He gave a gracious Audience to the Neighbouring Embassadors that came to surrender their Cities to the Faith of the Romans; and in the 44th Book, *Paulus* earnestly desiring that he might be allowed to
sur-

(i) But in this Case, as far as his own Security will permit, it is honourable to shew Clemency and Liberality.] See the generous Example of *Ferdinand King of Leon*, in *Mariana*, B. II. Cap. 15. and look back to what we have said before in this Book, Cap. II. §. 14. and 15.

surrender himself, and all he had, unto the Faith and Clemency of the People of Rome. But it must be understood, that by these Words is meant an Absolute Surrender: (k) And that the word *Fides* in these places signifies nothing but the Pious Honesty of the Conqueror, to which the conquered yields himself.

4. (l) There is a remarkable Story in *Polybius* and *Livy*, of *Phanea*, an *Ætolian* Ambassador, who in his Speech to the Consul *Manius*, said these submissive Words, *That the Ætolians did freely surrender themselves, and all they had, to the Faith of the People of Rome.* Which when he had affirmed again to the Consul, that often asked him of it; the Consul demanded, that the Chief Authors of the War should be immediately delivered up to him. *Phanea* presently replied, We surrender our selves up to your Faith, not unto Slavery; and that it was not the Custom of the Greeks to be commanded: The Consul answered, he valued not what the Custom of the Grecians was, that the Custom of the Romans was to impose Laws on those who had freely surrendered themselves; and presently ordered the Embassadors to be laid in Irons, *Do ye, having surrendered your selves to our Faith, pretend to teach us what we should do?* From which Words it is plain, what he to whose Faith any People have surrendered themselves, may of

(k) *And that the word Fides in these places signifies nothing but the Pious Honesty of the Conqueror, to which the Conquered yields himself.] Thus Polybius, Among the Romans to trust one self to the Faith of another, and to deliver one self up to the free disposal of the Conqueror, are all one. The Greeks say εἰς δίκην ὁπᾶς αὐτὸς παρορδιδόναι, To deliver themselves up to Justice, as Thucydides. B. 3. οἱ καὶ αὐτῶν ἐπιπρέπειν ἐξουσίαν, To deliver up the Power over themselves, as Diodorus Siculus, B. 14.*

(l) *There is a remarkable Story in Polybius.] In Excerpt. Legat. Num. 13.*

do with Impunity, and without violating the Law of Nations. For the *Roman* Consul did not make use of this Power, but dismissed the Embassadors, and gave the *Ætolian* Senate a longer time to consult about it. Thus the People of *Rome* are said to have answered the *Falisci*: They understood well enough, that the *Falisci* had yielded themselves not to the Power, but the Faith of the *Romans*. And of the *Campanians*, that they had submitted not by League, but by voluntary Surrender.

§. But concerning his Duty, to whom the Surrender is made, that of *Seneca* is very applicable, *The Conqueror is at his own Liberty to shew his Clemency, but he ought not to judge according to the utmost Rigour of the Law, but to Equity and Conscience; he may entirely forgive, or demand what Satisfaction he pleases.* Neither does it signifie much how the Person surrendring expresses himself, whether he yield to the Wisdom, Moderation, or Mercy of the Conqueror, for they are all but Compliments, the reality of the matter is, the Conqueror must be Judge.

LI. of a
Conditional
Surrender.

LI. But yet there are also Conditional Surrenders, which either take care of every Person, as when the saving their Lives, their Liberties, or some of their Goods be exprelly excepted, or for the Generality, of which some may even amount to a mixt Government, of which we have treated in another place.

LII. Who
may, and
ought to be
given for
Hostages.

LII. Next to the Articles of Surrender are to be considered Hostages and Pledges. (m) Hostages (we have said) are either such as freely give themselves, or are given by him that hath the Sovereign Power. For he that is possessed of the Supreme Civil Power,

(m) Hostages (we have said) are given.] In this Book Cap. 4. §. 4. See also Cap. 11. §. 18.

Power, has a Right both on the Actions and the Goods of the Subjects; but the Prince, or State, shall be obliged to make Satisfaction to him, or his Friends, for any Losses which he may thereby suffer. And if there be many nominated, and it be indifferent to the State which of them goes, it is best to decide that by Lots; but the Lord of the Fee has not this Right on his Vassal, unless he be also his Subject; for the Respect and Obedience that he owes him, does not reach so far.

LIII. We have already said, that a Hostage may be put to Death by the External Right of Nations, but not by the Internal, unless he himself be guilty of a Capital Crime. Neither can they become Slaves; but they may even by the Right of Nations enjoy, and leave their Goods to their next Heirs. Tho' it is provided by the Roman Law, that their Goods should be Confiscated to the Publick.

LIII.
What Right
is given over
Hostages.

LIV. The Querie is, whether a Hostage may lawfully Escape? and certainly he may not; if at first, or since, he hath engaged his word (in order to have a little more Liberty) that he would not; otherwise, it does not seem to be the Intent of the State that sent him, not to oblige their Subject from making his Escape, but to allow the Enemy to secure him as he pleased: And thus may the fact of *Clelia* be defended. But suppose she had not offended in doing it, (n) yet the State could

LIV. Whether a Hostage may lawfully escape.

(n) Yet the State could not receive, and detain their Hostage.] See *Plutarch* in the Life of *Publicola* upon this Subject, upon that of *Virgil*.

—*Vinctis innaret Clalis ruptis.*

The Bonds of the League, says *Servius*.

could not receive, and detain their Hostage; whereupon *Porfenna* declared, *If they did not send back his Hostage, he would take it as a Breach of the League*: Then the Romans immediately restored her, according to Covenant, as a Pledge of the Peace.

LV. Whether a Hostage may be lawfully detained upon any other account.

LV. The Office of an Hostage is very unpleasant, as well because it is a Confinement to the Person, as because it is done by the fact of another. Wherefore we are here to understand it in the strictest Sense, that they who are delivered Hostages in one case, cannot be detained in another: Which must be taken thus, provided at the last Covenant there was no mention made of Hostages; but if we have already broke our Faith in any other Case, or a just Debt contracted, then the Hostage may be retained, yet not as a Hostage, but by the Law of Nations, whereby Subjects may be detained Prisoners for their Sovereign's Debts καὶ ἀνδραγαθήαν, by way of Arrest, or Reprisal. Which also may easily be prevented, by inserting a Clause that those shall be restored, when that shall be performed for which they were engaged.

LVI. Upon the Death of the Principal, the Hostage to be free.

LVI. He that is delivered as a Hostage only, to release either a Prisoner, or another Hostage, if this die, the other is released; for by his Death all Right of Hostage dies with him, as *Ulpian* has said in the Case of a ransomed Prisoner: Wherefore as in *Ulpian's* Case the Ransom is not due, because he succeeded in the room of the Person, so in this Case the Person substituted cannot be here detained. Therefore the Demand of *Demetrius* to the Roman Senate to be dismissed, was not unreasonable, ὡς Ἀντιόχῃ μὴ ἀντιδοθεῖς, Ἀντιόχῃ δ' ἀποθανόντι, As being a Hostage for Antiochus, he being dead, he ceased to be so, says *Appian*; and *Justin* out of *Trogus*, *Demetrius being a Hostage at Rome, as soon*

soon as ever he heard of the Death of his Brother Antiochus, went directly to the Senate, and told them he came thither as a Hostage for his Brother being alive, but now he was dead, he could not tell whose Hostage he was.

LVII. But if the King, who made the Covenant die, shall his Hostage still be detained? That depends upon what we have already said, whether the League were Personal or real. For Accessories cannot justify us in receding from the general Rule in the Interpretation of Principals, whose Nature they themselves also ought to follow.

LVII. The King dying, whether the Hostage may be retained.

LVIII. By the way we must add this, that Hostages sometimes are not only Sureties of the Obligation, but really the Principal Parties; as when by Agreement, a Person engages himself for the fact of another; and upon its not being performed, he himself is obliged to make it good. Thus Hostages may stand obliged in his stead, which we have declared in another place, as it was determined in the Agreement at Caudis; but the Opinion of those who maintain that Hostages may stand engaged for the Fact of one another, without a mutual Consent, is not only severe, but unjust.

LVIII. A Hostage may be Principally obliged, and one of them is not bound for the fact of another.

LIX. Pledges have some things common with Hostages, and some peculiar to themselves. What they have in Common is, they may be detained for another Debt at present due, unless Faith be given to the contrary. The Peculiar is, that what Contract soever is made concerning these, is not so strictly taken, as that concerning Hostages. Neither is the Disgust alike, for it is natural that Things should be kept strictly, not Men.

LIX. What Obligation lies upon Pledges.

LX. We have said elsewhere, that no Time can prejudice the Right of Redemption, if that be performed for which the things were first deposited.

LX. The Right of Redemption, how lost.

posited. For that Act which was done upon an old and known Agreement, cannot easily be believed to proceed from a new one; therefore the Debtor's Forbearance to demand back his old Pledge, cannot be imputed to his forsaking it, unless some other very probable Conjectures may induce him to believe otherwise. As if when a Man was ready to have redeemed it, being hindered by some Impediment, had neglected it so long, as to give the Detainer some reason to suppose that he had forsaken it.

CHAP. XXI.

Of Faith during War, of Truces, of Safe Conduct, and the Redemption of Prisoners.

I. What a Truce is, and whether it be a Time of Peace, or War.

I. I. **T**HERE are some things that use to be granted mutually by Sovereign Princes in time of War, which *Virgil* and *Tacitus* call *Belli Commercium*, *The trading of Wars*. *Homer* συνθημασθαι, *Mutual Covenants*. Such as Truce, Safe Conducts, Ransom of Prisoners. A Truce is an Agreement, by which, during the War, for a time we forbear all Acts of Hostility. I say during the War. For as *Cicero* says in his Eighth *Philippick*, there is no middle between War and Peace. It may still be called a War, tho' its Actions be for a while suspended. *Aristotle* says, a Man may be called wise, tho' asleep; and virtuous, tho' not engaged in Action. And again, The distance of place doth not dissolve Friendship, it only interrupts the present exercise of it; and *Andronicus Rhodius*, There may be a habit, tho' at present it may not operate. So *Eustratius*, An habit, in respect to an Ability simply

simply taken, is called an *Act*, but in respect to *Action* itself, is called *Power*; as *Geometry* is in a *Geometrician* when he is asleep. And in *Horace*, *Lib. 1. Sat. 3.*

*Ut quamvis tacet Hermogenes, cantor tamen, atque
Optimus est modulator, & Alfenus vaser omni
Abjecto instrumento Artis, clausâque tabernâ
Sutor erat*————

*Why, as (a) Hermogenes, tho' he holds his Tongue,
Is skill'd in Music, and can set a Song;
And shuffling Alfen, tho' he lost his Awl,
And (b) threw away his Last, and shut his Stall,
And broke his Threads, yet was a Cobler still.*

Creech.

2. So then, as *Gellius* says, *A Truce cannot be called a Peace, for the War continues, tho' fighting ceases.* And in the *Panegyrick of Latinus Pacatus*, *Truce suspends a War.* Which I here mention, that we may understand that whatever is agreed upon to be of force during a War, has also the same force during a Truce; unless it fully appear, that it was not so much the general State of War, as the Exercise of it, was had regard to. On the contrary, if any thing be agreed on concerning Peace, it is of no force in time of Truce. Tho' *Virgil* calls a Truce *Pacem Sequestrem*, an indifferent Peace; and *Servius* a *Temporary Peace*; and so does the *Scholiast on Thucydides*, bringing forth a *seasonable Peace.* *Varro*, *Pacem Castrorum*, the Peace of Camps

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for

(a) Hermogenes.] *Seneca de Benef. 7. c. 21.* He is also eloquent, that is silent.

(b) And threw away his Last.] *Seneca* in the aforesaid place He also is an Artist, who may not have Tools to follow his Trade.

for a few Days. All which are not Definitions, but certain Descriptions, and those Figurative. Such also was that of *Varro*, when he calls it *Bel-lorum ferias*, *War's Holy-day*: He might as well have called it *Belli Somnum*, *War's Sleep*. So *Papinius* called the Days wherein there was no pleading, *Peace*. And *Aristotle* called Sleep *The Chain of the Senses*; and so you may call Truce *The Fetters of War*.

3. But in *M. Varro's* Exposition (which also *Donatus* follows) *Gellius* finds just fault with this, that he added, a few Days, shewing that it is sometimes granted for a few Hours, I may also add for 20, 30, 40, nay 100 Years, of which we have Examples in *Livy*; which may also confute that Definition of *Paulus* the Lawyer, *A Truce is, when it is agreed for a short time prefixt, neither Party shall offer Acts of Hostility*.

4. But yet it is possible, that if it shall clearly appear, that an Absolute Cessation from all Acts of Hostility was the only Reason simply and wholly moving both Parties to make such an Agreement, that then whatsoever is said concerning a Time of Peace, may be likewise said of a Truce; not by vertue of the Word, but from a certain Conjecture of the Intention of the Mind; of which we have treated elsewhere.

II. The
Original of
the Word
Induciaz.

II. The Word *Induciae* (a Truce) is not (as *Gellius* would have it) from *inde uti jam*, from thence as now: Nor (according to *Opilius*) from *Endoitus* (or *Endoitium*) i. e. a beginning; but from *inde otium*, there should be rest from such a time, as the Greeks call it ἐνεχρησιν, a Cessation of Arms. For it appears both from *Gellius* and *Opilius*, that the word (*Induciae*) was by the Ancients written with a (t) and not a (c); and what we now use in the Plural, was certainly used of old in the Singular Number, the old Word being *Endoitia*; for then

then they pronounced *Otium* (Rest) *Oitium*, from the Word *Oiti*, which we now pronounce *Uti* (to use); (c) as from *Poina* (we now write *Pœna*, Punishment) is made *Punio* to punish; and from *Poinus* (now *Pœnus*, a Carthaginian) is made *Punicus*. So of the Word *Ostia*, *Ostiorum*, the Entries or Mouths of Rivers is now made (d) *Ostia*, *Ostia*; so from *Indoitia*, *Indoitiorum*, is made *Indoitia*, *Indoitia*, and thence *Indutia*, whose Plural (as I said) is now only in use. Gellius says it formerly stood for the Number One. Donatus is not much in the wrong, when he would derive *Inducia* from *in dies otium*, a Rest for some Days. A Truce then in War is a Rest, not a Peace; therefore some Historians nicely distinguish it, when they say a Peace was refused, but a Truce granted.

III. Wherefore (the Truce being expired) there is no occasion for a new Declaration of a War; for the Temporary Impediment being removed, the War appears again, and enjoys its own Rights, not having been dead, but asleep, as the Power and Sovereignty does over a Madman, when he is come to himself. But we read of a War in *Livy*, by the Judgment of the Heralds, denounced again upon the expiring of the Truce. But the old Romans were desirous to shew by those unnecessary Cautions how much they loved Peace, and how unwillingly they engaged in War, tho' upon a just Cause. *Livy* intimates as much, when he says, *After a Battle fought with the Veientes at Nomentum and Fidenæ, a Truce was granted, but no Peace made, and the Truce expired, and they had*

III. Upon the ending of a Truce, there is no need of denouncing War again.

Y 2

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(c) As from *Poina* (we now write *Pœna*) Punishment.] See Servius on the 10th *Eneid* on the Word *Marorum*.

(d) *Ostia*, *Ostia*] And from *Ostrea*, *Ostreorum*, is now made *Ostrea*, *Ostrea* (an Oyster.)

rebelled within that time, yet the Heralds were sent, who not being satisfied in their Demands, denounced War.

IV. How
the Time of
a Truce is
to be com-
puted.

IV. 1. The time appointed for a Truce, is either continual, as when it is made for a hundred Days, or by prefixing a Time when it shall end, as unto the Calends (or first Day) of *March*. In the former the reckoning must be to the last Moment, for that is Natural. For that account which is made by Days Civil, arises from the Laws and Customs of Nations. In the other kind it is generally asked, whether the Day, the Month, or the Year, on which the Truce is to expire, is meant to be excluded, or included.

2. All natural things have certainly two sorts of Bounds, the one within the thing, as the Skin is the Bound of the Body; the other without the thing, as a River is the Bound of the Land. According to either of these two Ways, may those Bounds that depend upon the Will be limited; but it seems more natural, (e) that the Bound should be taken, which is part of the thing, *ἡ ὅρα δὲ τοῦ ὅλου ἐστὶν ἡ ἐξέσχατος*, That is called the Bound of any thing which is the extream part of it, says Aristotle. Neither is this against Common Use. *Spurina* forewarned *Cæsar* of a danger that should not exceed the Ides (or the 15th) of *March*. Being asked upon the very Day about it, he said, (f) it was indeed come, but not yet past. Wherefore much more should this Interpretation of Truces be thus understood, where the lengthning of the Time has in it

(e) That the Bound should be taken, which is part of the thing.] *Baldus* upon the word *usque*. *Bartolus* in l. *Patronus*. D. de *Legatis* 3. and l. *Nupta* D. de *Senat. Archidiaconus* in C. *Ecclesiast.* 13. *Hieronimus de Monte Lib de fin.*

(f) It was indeed come, but not yet past.] *πᾶσις*, &c. and so *Appian*, *πᾶσις*, &c.

itself a Favour, viz. the sparing of Human Blood.

3. But yet that Day, from whence any Truce is to commence, is not to be reckoned as one of the Number, because the force of the Preposition does not signifie Conjunction, but Separation.

V. This I shall add by the way, that Truces, and such like Agreements, do immediately oblige both Parties consenting from the time they are concluded; but the Subjects on both sides then begin to be bound, when the Truce receives the form of Law by a Publick Proclamation; which being done, it immediately begins to have a Power to bind the Subjects. But that Power, if the Proclamation be made only in one Place, shall not at that instant extend it self throughout the whole Dominion; but upon a convenient time allowed to give Publick Notice in every place. And if any thing in the mean time be done by the Subjects contrary to the Truce, they shall not be punishable for it. (g) Neither are the Persons accessary to the Loss bound to repair those Damages.

V. When they begin to bind.

VI. 1. What may be lawfully done, and what not in the time of Truce, may be understood from the Definition of it. All Acts of Hostility are unlawful, either against Persons, or Things; that is, whatsoever is then done by force of Arms against the Enemy. For all such Acts, during the time of Truce, is against the Law of Nations, as *L. Æmilius*, in *Livy*, tells his Soldiers.

VI. What may be lawfully done during a Truce.

Y 3

2. Nay

(g) Neither are the Persons accessary to the Loss bound to repair these Damages.] As of *Scio* in *Thucydides* 4. theretore that cannot be defended which *Marians* relates was done by the *Spaniards* in *Italy*. 28. 7.

2. Nay, whatsoever things of the Enemy shall by Accident fall into our Hands, tho' they had been formerly ours, are to be restored; because by External Justice, under whose Cognisance they fall, makes them their Enemies. And therefore, as *Paulus* the Lawyer observes, the Right of Postliminy, during a Truce, is as it were of no use, because Postliminy requires, that the Right of taking away in War should go before, which during a Truce is not allowed.

3. To come and go, to have free egress and regress, so that our Habit look not dangerous, as (*b*) *Servius* observes on those Words of *Virgil*,

Mixtique impune Latini.

Latians, no longer Foes, mixed in the Woods.

Where he also tells us, that the City of *Rome* being besieged by *Tarquin*, a Truce was agreed upon between *Porfenna* and the *Romans*, whilst the *Circæan Games* were celebrated in the City, the Enemies Captains were allowed to come into the City, and contend in the Races, and if they proved Victors, were crowned.

VII. Whether to retire back, to repair Breaches, or the like?

VII. To retreat back with an Army, which we find in *Livy* that *Philip* did, is not a Breach of Truce; nor to repair a Wall, nor to levy Soldiers, (*i*) unless it be particularly excepted in the Agreement.

VIII. A distinction concerning seizing of Places.

VIII. 1. It is undoubtedly a Violation of the Truce to seize on Towns by corrupting the Garrisons, for such a Purchase cannot be made but by the Right of War. The same may be said of Subjects, who if they would, cannot Revolt to their Enemies. We have an Example in *Livy's* 42d Book,

(*b*) *Servius* observes] Upon the 11th *Eneid*.

(*i*) Unless it be] particularly excepted in the Agreement.] As in *Patriarcha*, B. 3.

Book, when the People of *Coronæa* and *Haliarſus*, in Kindneſs to Monarchy, ſent Embaſſadors into Macedon, to deſire a Garrifon that might defend them from the Inſults of the Thebans; the King told them he could not ſend them any, having lately made a Truce with the Romans. In the fourth Book of *Thucydides*, we read that *Brufidas* poſſeſſed the City *Menda*, revolting from the *Athenians* to the *Lacedemonians* in time of Truce; at the ſame time excuſing himſelf, by alledging that the *Athenians* had done the like.

2. It is indeed lawful to take Poſſeſſion of Places deſerted, that is, really deſerted, viz. with a deſign not to poſſeſs them again; but not, if they be left ungarrifoned, whether the Garrifons were withdrawn before the Truce, or upon the making of it. For the Propriety remaining renders the other's Poſſeſſion unjuſt, which diſproves that Argument of *Belifarius* againſt the *Goths*, who upon pretence of being deſerted, ſeized (k) upon ſome Places left unguaſded upon the Account of a Truce.

IX. 1. The Querie is, whether he who is detained by force during the Truce, and is found among the Enemies at the expiring of the Truce, has (by the Law of Nations) a Right to return? If we barely reſpect this External Right of Nations, his Caſe is the ſame, who coming in time of Peace, upon the ſudden breaking out of the War (not having time to withdraw) is unhappily found among his Enemies, who, we have already declared, is to continue a Priſoner till the end of the War. Neither is it againſt Internal Juſtice, ſince the Goods and Actions of the Enemies ſtand obliged for the Debt of their State, and may be taken by

IX. Whether he may return that is forcibly retained during the Truce?

Y 4

way

(k) Upon ſome Places left unguaſded.] The Port, Centum Cells, Albanum.

way of Payment. Neither has he any more cause to complain than many Innocents, on whom the Calamities of War accidentally fall.

2. Neither must we to this refer the Case of smuggled Goods: Nor that in *Cicero's* 2d Book of Invention, concerning a Ship armed with an Iron Beak, by a Storm driven into Harbour, which the Questor would have Sold by the Law. For there a greater force (of the Tempest) excused the Punishment. Here we do not properly Discourse of Punishment; but of the Right that for a certain time lay neglected, yet it would be far more generous, far more honourable to release such a one.

X. Of the
Special Agree-
ments of
Truces and
what Que-
ries usually
arise from
thence.

X. There are also some things unlawful during a Truce, from the Special Nature of the Agreement. As suppose a Truce were granted only for the burying of the Dead, nothing ought to be changed; so if a Truce be made, (1) that the besieged should not, within such a time, be assaulted, then it would be unlawful to receive fresh Supplies of Men or Provisions. For since such a Truce is granted to oblige one Party, the other ought not to be prejudiced by it. And sometimes it is agreed in the Truce, that they shall not have Liberty to pass and repass; (m) sometimes Protection is granted to Persons, not to Things; whereupon if any Person be wounded in Defence of his Goods, it is not any breach of the Truce. For since it is lawful to defend our Goods, Personal Safety is to be referred to that which is Principal,

(1) That the besieged should not (within such a time) be assaulted.] As to the Neapolitans by Totilas in *Procopius*.

(m) Sometimes Protection is granted to Persons, not to Things.] See *C. Signif. de Judeis*. Of Truces with exception of Places you have Instances in *Procopius* and *Menander Protector*.

cipal, not unto that which comes by Consequence.

XI. If the Faith of Truce be broken on one side, the other may proceed to Acts of Hostility without any Declaration; for every Article of the Agreement implies a Condition, as I have said a little before. We may find some Examples in Histories, where some have bore it out to the end of the Truce. But read of the War made upon the *Hetrurians*, and others, for breach of Truce. From which Diversity of Examples we may infer it to be lawful for the injured Person to have recourse to Arms; but whether he will, or not, is left to his own Choice.

XI. A Truce broken on one side, the other may renew the War.

XII. This is certain, that if the Punishment agreed on, be demanded, and be inflicted on the Transgressor, then the other Party has no Right to make War; for therefore Punishment is inflicted, that other Things may continue safe. So on the contrary, if the War be renewed, the Offender is acquitted from Punishment, since the other had his Choice.

XII. What if a Punishment be added.

XIII. But private Facts do not break a Truce, unless seconded by a publick Act; suppose of Command or Approbation, which is also implied, if the Offender be neither punished nor delivered up, nor Restitution made.

XIII. When private Acts break the Truce.

XIV. A Right to pass and repass beyond Truce, is a kind of Privilege; therefore what we have already said concerning Privileges, must be observed in the interpreting of it. But this is a Privilege not hurtful to any third Person, nor very grievous to him that granted it, therefore not to be taken in the strictest Sense of the Words, but with some Allowance. And more especially, if it were not granted upon Request, but freely offered. But still the more, if besides a private Advantage, a publick one is intended. Therefore

XIV. Free Passage without a Truce, how to be interpreted?

fore we are to reject a strict Interpretation, tho' the Words may bear it, unless it would otherwise create an Absurdity, or that very probable Conjectures of the Intent of the Person may induce us to it. But on the contrary, a kind Construction even beyond the proper Signification of the Words shall take Place, to prevent such an Absurdity, or from very reasonable Conjectures.

XV. *Who may come under the Name of Soldiers.*

XV. Hence we gather, that a safe Pass granted to Soldiers, extends not only to Inferior Captains, but also chief Commanders; because the Propriety will allow that Signification, tho' there is also another more strict. So under the Name of a Clerk is comprehended a Bishop. So the Mariners Fleet may be called Soldiers, and all in general, who have taken the Military Oath.

XVI. *To go, to come, to return, how to be here understood.*

XVI. 1. Leave given to come, implies also one to return; but not by Force of the Word, but to avoid an Absurdity; for a Kindness should not be done by halves, therefore we must understand a safe Return, till we shall be got into a Place of Safety. (n) It was therefore Treachery in *Alexander*, to cause them to be murdered in their Return home, to whom he had given leave to depart.

2. But he that has leave given him to go away, has not also to come back again; so neither has he, that is allowed to come, a Liberty to send, nor on the contrary; for they are distinct Things, neither will Reason warrant us to go beyond the Words; but yet tho' an Error cannot give any Right, it may excuse from Punishment, if any were adjudged. But even he that has leave to come,

(n) *It was therefore Treachery in Alexander.] So Plutarch. This was a Blemish to the great Actions of that King, who used to act justly, and generously in War; the like Act you have of Bajazet, to the People of Nidin in Servia, in Leunclave, B. 6.*

come, shall come but once, and not again, unless the Time allowed in the Pass may seem to imply otherwise.

XVII. The Son must not follow the Father, nor the Wife her Husband, unless to continue with him; for we use to dwell, not to Travel with our Families. But a Servant or two, tho' not particularly express'd, shall be presumed to be allowed, to him that cannot conveniently Travel without them. For he that grants the Principal, is supposed to grant the necessary Consequents, which is here to be Morally understood.

XVII. How far a safe Conduct extends to Persons.

XVIII. Goods likewise shall be comprehended, perhaps not all, but what are necessary for Travellers.

XVIII. How far unto Goods.

XIX. Under the Name of Attendants we must not understood those, who are more obnoxious than the Principal. Such are Pirates, Robbers, Fugitives, and Deserters. The expressing the Name of their Country in the Pass-port, plainly shews that the Protection does not extend to Foreigners.

XIX. Who may come under the Name of Attendants, and who under the Notion of a Nation.

XX. Licence to pass freely granted by Virtue of the Supreme Power, in a dubious Case does not cease by the Death of the Granter, according to what we have said before, concerning the Grants of Kings, and Sovereign Princes.

XX. Whether a Pass-port be valid upon the Death of the Granter?

XXI. It is often disputed, what is meant by this Expression in a Pass, *during my Pleasure*. And the best Opinion is, that it shall last till the Donor shall declare his Will to be otherwise, for that is presumed to continue in a doubtful Case, which is sufficient to give a Right: (o) but not if he that granted

XXI. What if it be given only during the Pleasure of the Granter?

(o) But not, if he that granted it, be disabled to Will, which may happen by Death.] L. Lucius Titius de Donat. so as a great Man Antonius Taber corrects it, putting *voluere* for *volueris*: Add. L. Locatio, § Lo-

granted it be disabled to Will, which may happen by Death : For the Person being deceased, what depended on his Will likewise ceases, as Accidents do upon the failing of the Substance.

XXII. Whether Security be allowed beyond the Territory of the Donor ?

XXII. But a safe Pass is a Security to him who has it, even beyond the Territory of the Granter, because it is granted by way of Protection against the Licence of War, which of it self is not confined to any particular Prince's Dominion, as we have said in another Place.

XXIII. The Redemption of Prisoners a favour.

XXIII. The Redemption of Prisoners is very much favoured, especially amongst Christians, to whom the Divine Law particularly recommends this singular Act of Mercy. *The Redeeming of Prisoners is a great, and essential Part of Justice, says Lactantius.* To redeem Prisoners, especially from a barbarous Enemy, is called by St. Ambrose, the most Noble and highest Liberality. The same Author defends his own and the Churches Fact, (p) in breaking to Pieces the consecrated Vessels, to redeem Prisoners. *The greatest Ornaments of Sacraments (says he) is the redeeming of Captives; and many other things to the same purpose.*

XXIV. There

§ Locati. Cordin. Tusch. p. p. Cornelus. 751. lip. p. Reinking, B. 1. class. 2. c. 8. numb. 30.

(p) *In breaking to Pieces the consecrated Vessels to redeem Prisoners.* St. Austin imitated this Action of St. Ambrose, as Possidius relates, who says it was done against the Carnal Sense of some Persons. Also in the same Africk the Bishop Deogratias did it, as Victor Uticensis writes, B. 1. and Hincmar in the Life of Remigius, that the Vessel of Remigius was given to redeem Prisoners from the Normans. Thus Adam of Brene, Eccles. Hist. cap. 32. commends the like Act of Rimbert Archbishop of Brene. Also the 6th General Synod approves of it, the Decree being referred to the Cause 2. quest. 2. Which may be added, to what we have said before in this Book, c. 5. § 2.

XXIV. 1. There being such Authority, I dare not positively approve those Laws, which forbid the ransoming of Prisoners, as we may read of among the *Romans*; *No City so Negligent of Captives as ours*; said one in the *Roman* Senate. And *Livy* calls *Rome*, a City no way kind to Prisoners as formerly. The Ode of *Horace* is well known on this Subject, where he calls the redeeming of Prisoners a scandalous Act, and an Example of dangerous Consequence, a villanous Act attended with Loss. But what *Aristotle* condemns in the *Spartan* Laws, is generally blamed in the *Roman*; namely, that they all tended to the Advancement of Warlike Affairs, as if the Safety of their State consisted only in them. But if we would consider it according to Humanity, it were better sometimes to recede from the rigour of the Law of War, (q) than to leave so many Men, and perhaps Kindred and Country Men, unto intollerable Slavery.

2. Such a Law then cannot be esteemed just, unless there appear a Necessity for that Severity, purely to prevent greater, or otherwise morally unavoidable Calamities. For in such a Necessity, the Prisoners themselves by the Rule of Charity should patiently bear their hard Fortune, this also may be inflicted on them, and threatned to others, to deter them from the like Behaviour; according to what we have writ in another Place, that a Citizen may be delivered up for the good of the Publick.

XXV. Prisoners taken in War are not made Slaves, by our Laws or Customs. Yet I doubt not, but that Right of demanding a Ransom from one so taken, may be transferred by the Captor

XXIV.
Whether
such a Re-
demption
can be for-
bidden by
any Law,
explained.

XXV. The
Right in a
Prisoner
may be
transferred,
to

(q) *Than to leave so many Men, and perhaps Kindred and Country-Men unto intolerable Slavery.* See *Zonaras* concerning the severe Repentance of the Emperor *Mauritius* for such a Fact.

to another, for Nature allows even Incorporeal things to be alienated.

XXVI. *The Ransom of one may be due to more than one.*

XXVI. And the same Person may be indebted for his Ransom to several Men; as if discharged by one, before he paid his Ransom, he be taken by another, for these are distinct Debts from distinct Causes.

XXVII. *Whether the Ransom agreed upon may be made void, if the Estate of the Person be then unknown.*

XXVII. An Agreement made for a Ransom cannot be made void, because the Prisoner is found to be much Richer than he was thought to be; because by the External Right of Nations, which here prevails, no Man may be compelled to give a greater Price than what he first agreed for, if there was no Cheat in that Contract; as may be easily understood from what I have said already concerning Agreements.

XXVIII. *What Goods of a Prisoner belong to the Captor.*

XXVIII. From what has been said already, that Prisoners are not now made Slaves, it follows, that the Power we have over their Persons, doth not derive an universal Right to all that is theirs; as we have said in another Place. The Captor then has Right to nothing but what he actually takes, wherefore if the Prisoner can hide any thing from him, it is none of the Captor's, because he was not possess'd of it. As *Paulus* the Lawyer argues against *Brutus* and *Manilius*, he that seizes upon a Field, cannot be said to possess the Treasure that is buried there, because he knows not of it; for no Man can possess, what he knows not of; whence it follows, that what is so concealed may help to pay for his Ransom, he having still kept the Right of it.

XXIX. *Whether the Heir be chargeable with the Prisoner's Ransom.*

XXIX. 1. There is also another Query, whether a Ransom agreed upon, and not paid before the Prisoner's Death, is to be recovered from the Heir; my ready Answer is, if he dy'd in Prison there is nothing due, for the Agreement was made upon Condition that he should be set at Liberty;

ty; but he that is dead cannot be so. On the contrary, if he die, being set at Liberty, it shall be due; because he had already enjoyed that, for which the Ransom was promised.

2. I freely own, that the Contract may be so made, that the Ransom shall be simply due from the very Moment of the Contract, and the Captive shall still be detained, not as a Prisoner of War, but as one engaged for himself. So on the contrary the Covenant may be so made, that the Mony of the Ransom shall be only then due, if the Prisoner be alive, and at Liberty, upon a Day prefixt. But these Things being less Natural, are not presumed to be done, unless by manifest Tokens.

XXX. Here is one Query more, whether he is obliged to return to Prison, who was released on Condition of releasing another, if that other die before the Releasement. I have proved elsewhere, that the Promise of a third Person freely made is fully performed, if nothing be omitted on the Part of the Promiser; but a Promise being made upon a valuable Consideration, the Promiser stands obliged to the full Value, that he promised. So in this very Case, he that is released, is not obliged to return into Custody, because it was not so agreed. Neither will the favour allowed to Liberty, let it be so understood; neither ought any one to make a Gain of another Man's Liberty, (r) but the Person released shall pay the Value of what he could not perform. For this is more agreeable to natural Truth, than what the Expositors of the *Roman Laws* have delivered unto us.

XXX. Whether he that is released to free another ought to return. the other being dead.

C H A P.

(r) But the Person released shall pay the value of what he could not perform] That *Paulus Balionius* did not do, being released upon Condition to set *Carvilius* at Liberty. who died before he could be released, for which *Mariana* blames *Balionius*, B. 30. *Paruta* relates the manner of the Fact somewhat otherwise, B. 2.

C H A P. XXII.

Concerning the Faith of Inferior Commanders in War.

I. The several kinds of Commanders.

I. **A**MONG publick Agreements *Ulpian* reckons this as one, *when the Generals of each Army agree some things between themselves.* I promised, that after having discoursed on Faith given by Sovereign Powers, to say something of that given by Inferior ones, either between themselves, or unto others; whether those Powers be immediately next to the Sovereign, such as Generals, who have the absolute Command of the Army; to which we may apply that of *Livy*, *We allow no other as General, but he to whose Conduct the whole War is committed*; or those of a Lower Rank, whom *Cæsar* thus distinguishes, *The Duty of a private Captain is one thing, and that of a General another. The one is to execute Orders, the other freely to Consult, and take Care of the whole.*

II. How far an Agreement made by them obliges the Sovereign Power.

II. But there is to be a twofold Inspection into their Engagements. As whether they thereby engage the Supreme Power, or whether themselves. (a) The former Query may be determined by what I have said elsewhere, *viz.* That Princes are obliged by those whom they depute to be Ministers of their Wills, whether that Will be specially express'd, or gathered from the Nature of their Office. For he that grants a Power, grants, as much as he can, all Things necessary to that Power, which in Moral Things is to be

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(a) The former Query may be determined by what I have said elsewhere.] See *Camden* in the Year 1594. in the Proposition of Count *Miranda* in the Cause of *Hawkins*.

Morally understood. Inferior Commanders therefore may bind their Sovereigns two several ways, either by doing that which probably belongs to their Office, or by doing that which belongs not to it, yet have a special Commission to do it, which is either publicly known, or to those with whom we treat.

III. There are also other ways, whereby a Sovereign Power may be obliged by the previous Facts of his Officers, but yet not so, that that Fact is the proper Cause of that Obligation, but only the Occasion of it; and that two ways, either by consenting to it, or by the thing it self. Their Consent will appear by their Approbation, which may be given not only expressly, but tacitly; that is, when the Sovereign Power had Knowledge of it, and yet permitted it to be done, which cannot probably be referred to another Cause, and how this may proceed we have shewed in another Place. By the thing it self he may be so far obliged, as not to enrich himself by another's Loss; that is, either that he perform the Agreement, by which he receives a Benefit, or quit that Benefit; of which Equity I have also treated elsewhere. And thus far, and no farther, that Saying holds true, *Whatever brings Profit, is binding.* On the contrary, we must condemn them of Injustice, who refuse to perform the Agreement, and yet still retain that, which they could never have had without the Agreement; as when the Roman Senate could neither approve the Fact of *Cn. Domitius*, nor would make it void, as *Val. Maximus* observes: We meet with many such Examples in History.

IV. I. And here we must repeat what we have formerly said, viz. that the Sovereign is obliged by the Fact of his General, tho' he act contrary to his private Instructions, provided he keep

III. Or
gives Occa-
sion to such
an Obliga-
tion.

IV. What
if any thing
be done con-
trary to
Command?
this explain-
ed by Distin-
ctions.

within the Bounds of his publick Office. The *Roman* Prætor well observed this Equity in Actions relating to Factories. For not every Contract made by a Factor, binds the Person that employs him, but such only as are made for such Goods for which he is appointed Factor; but if it be publicly proclaimed, that no Man should henceforward Contract with him, he shall not be any longer treated with as an Agent. Tho' indeed such a Proclamation be made, and it be not known to the Contractors, he that employed him shall be obliged, and the Condition of his Ministry is to be observed. For he that is willing to be treated with under a certain Condition, and by the Intervention of such a Person, it is very equitable that that should be observed, which has been agreed upon by the Person so Commissioned.

2. Whence it follows, that Kings or People, some more some less, may be bound by the Contracts of their Generals, if their Laws and Constitutions be sufficiently known. But if they be not well known, we must follow the most probable Conjectures, which always suppose that to be within their Power, without which they cannot well discharge their Office as General.

3. If an Inferior Officer exceeds his Commission, and promise more than he can perform, he himself should be bound to full Restitution, unless some well known Law shall hinder it. Or if there be any Deceit in it, as if the General should pretend to a greater Power than really he has, he shall then be bound to make Satisfaction for the Damages consequent thereto; nay upon a just Complaint he shall be brought to Condigne Punishment. In the former his Goods are liable to make a Recompence, but if they are not sufficient, his Service or Corporal Liberty. In the latter also, his Person or his Goods, or both, according

ing to the Greatness of his Crime : But as I have said of Deceit, it will not be enough in Case of it, to declare beforehand, that he will not oblige himself, for both Satisfaction for Damages received, and Punishment for an Offence committed are due, not by a Voluntary, but by a natural Obligation.

V. But because in all such Agreements either the Sovereign, or his Minister, stands obliged, therefore by Consequence the other Party stands engaged likewise, neither can it be said the Contract is imperfect. Thus we have done with the comparing the Inferior Officers to their Superiors.

V. In such a Case whether the other Party stands obliged?

VI. Let us also see, what Power they have over their Inferiors; neither is it to be doubted, but that a General has a Power over his Soldiers, and a Magistrate over his Citizens, as to those particular Acts which are usually subject to their Command, and not otherwise without their Consent. On the contrary, an Agreement made by a General or Magistrate in Things merely advantageous, shall absolutely oblige their Inferiors; for this is enough warranted by their Authority: yea, and in such Things as may be burdensome, provided those Burdens are usually exacted, but otherwise not without their Acceptance: Which Things agree to what we have already proved from the very Law of Nature. But these Generals will be more clearly illustrated by handling of the Particulars.

VI. What the Generals in War, or Magistrates may do concerning their Inferiors, or for them.

VII. (b) It does not belong to a General to examine the Causes, or Consequences of a War, for it is his Business to manage the War, not to conclude

VII. It is not in the Power of Generals to make a Peace.

Z 2

(b) It does not belong to a General, to examine the Causes or Consequences of a War] Belisarius said to the Goths. For neither have we any Power to dispose of what belongs to the Emperor.

conclude it, no, tho' he has an unlimited Power in his Commission, that being only understood of the Conduct of the War. *Agefilaus* thus answered the *Persians*, *It was only in the Power of the State to make Peace. Therefore the Roman Senate made void that Peace, which Albinus made with King Jugurtha*, as *Salust* tells us, *because it was made without the Order of the Senate.* And in *Livy*, *How can that Peace be established, which is made without the Authority of the Senate, or Decree of the People of Rome?* Therefore the Promise made at *Caudis*, and at *Numantia*, did not bind the People of *Rome*, as we have shewed in another Place. And thus far is that of *Posthumius* true, *If there be any thing in which a People may be obliged, they may to all Things*; that, is to all Things that do not belong to the Conduct of War; and this is evident from what has been said already of Surrenders, and about Engagements for the leaving or burning of Cities, and of the Change of Government.

VIII. *Whether he may grant a Truce? This is distinguished.*

VIII. (c) To grant a Truce is in the Power only of a General, but not of Inferior Commanders, that is, unto those whom they either Attack or Besiege, as far as it concern them, and the Forces under their Command. For they cannot thereby oblige others the like Commanders, as the History of *Fabius* and *Marcellus* in *Livy* informs us.

IX. *What Protection of Persons, or Things, may be granted by them.*

IX. 1. It is not also in the Power of Generals to dispose of Men, Empires, or Lands gained in a War; upon which Account *Syria* was taken from *Tigranes*, tho' *Lucullus* had bestowed it upon him; neither could *Masinissa* release *Sophonisba*, whom he had taken in War, because *Scipio* maintained, that she was under the Power, and at the Discretion

(c) To grant a Truce is in the Power only of a General.] See *Pasura*, B. 5.

tion of the People of *Rome*: But as to other Things, which are by way of Prey, the General has a kind of Right, yet not so much by Virtue of his Authority, as from the Custom of Nations, of which we have said enough before.

2. But as to Things not as yet actually possess'd, it is entirely in the General's Power to forgive; because in War many Cities and Men often surrender themselves, upon Condition of preserving their Lives and Liberties, or sometimes their Goods, of which the present Circumstances will not allow so much time as to consult the Sovereign. By a Parity of Reason, this Right may be granted to Inferior Commanders concerning Things particularly committed to their Conduct. *Maharbal* in the Absence of *Hannibal* had given leave to some *Romans* that had escaped at the Battle of *Thrasymene*, to depart not only with their Lives, & *ownes*, with Safety, as *Polybius* too much confines the Expression, but upon delivery up of their Arms, not to be stript, yet *Hannibal* detains them, alledging, (d) that it was not in the Power of *Maharbal* to grant such a Pass, without his Knowledge. And *Livy* censures his Action thus. *Hannibal kept his Faith like a true Carthaginian.*

3. Wherefore let us consider *M. Tully* rather as an Orator, than a Judge, in the Cause of *Rabinus*. He would argue that *Saturninus* was lawfully killed by him, tho' *Marius* the Consul had got him out of the Capitol upon Promise of Life. How could Faith (says he) be given, without consulting the Senate? and so would infer, that the Faith given by *Marius* did not oblige himself; Z 3 when

(d) That it was not in the Power of *Maharbal* to grant such a Pass without his Knowledge.] Not more allowable was that Shift, which in a like case *Bajazet* made use of to the *Servians* of *Cratavia*, as *Leunclave* relates, B. 6.

when as *C. Marius* was empowered by the Senate to use his utmost Endeavour, to preserve the Empire and Majesty of the *Romans*; who can deny that the Right of pardoning Offenders, if it be to secure the State, was not comprehended (e) in the Consular Power, which was always esteemed the highest among the *Romans*?

X. Such Agreements are to be taken in a strict Sense and why.

X. But in these Agreements made by Generals, because they act for another, the strictest Interpretation is to be taken, as far as the Nature of the Contract will allow, lest by their Fact their Sovereign be not more obliged than he is willing, or themselves suffer Damage in the Execution of their Office.

XI. How a Surrender accepted by a General is to be understood.

XI. So he that is accepted of by a General upon an absolute Surrender, shall be judged to yield himself wholly to the Will of the Conqueror, whether of the King or People. An Instance of which we have in *Gentius*, King of *Illyria*, and *Perseus* of *Macedon*, of which the former yielded to *Anicius*, the other to *Paulus*.

XII. How that Caution is to be understood if the King or People please.

XII. Wherefore the adding of this Caution, *It shall be established if the State confirm it*, which we often find in Agreements, will provide, that if the Agreement be not allowed by the Sovereign, the General himself shall not be a Sufferer, unless it appears that he has thereby enriched himself.

XIII. How the Promise of delivering up a Town is to be understood.

XIII. And they who have engaged to deliver up a Town, may dismiss their Garrisons, as we read the *Locrians* did.

(e) In the Consular Power, which was always esteemed the highest among the *Romans*.] See *Sallust* in the War of *Catiline*. That of *Gonsalvo* to the Duke of *Valentino*, was not unlike to this *Cavilling* of *Fully*, *Guicciardin*, B. 6.

CHAP.

C H A P. XXIII.

Of Faith given by private Men in War.

I. **T**HAT Saying of Cicero is well known, *Whatsoever any private Person, urged by Necessity, shall promise to the Enemy, even in that very thing he must keep his Faith.* Private here implies, either Soldier or Peasant, for Faith is to be kept by all. It is admirable, that any Men vers'd in the Laws should maintain, That Faith in publick Agreements made with the Enemy is to be kept, but not in private; for if private Persons have particular Rights that are Obligatory, and an Enemy be capable of enjoying those Rights, what should hinder such an Obligation? Besides, unless this be allowed, there would be an opportunity given for Murders, and a bar to Liberty; for if private Faith were not held obligatory, the Lives of many Men could not be saved, nor their Liberty procured.

II. Further, not only to those who are Enemies by the Law of Nations, but even to Thieves and Pirates, we are to keep our private Faith, as if it were publick, as we have shewed before; with this difference, that if an unjust Fear, occasioned by the promised, shall force a Promise from us, the Promiser may demand Restitution, and upon Refusal may take it upon himself; which by the Law of Nations could not be done, if that Fear proceeded from a publick War. But if that Promise were confirmed by an Oath, the Promiser must perform what he has covenanted for, unless he would be perjured. But if such a Perjury be committed against a publick Enemy, it is punishable by Man; but if against Thieves, or Pirates,

I. That Faith given by private Men in War is not binding, considered.

II. Faith given to Pirates and Thieves is binding, and how far.

it is connived at in Detestation of them, by them who get Advantage by it, (though not really justifiable.)

III. A Minor here not excepted.

III. In this private Faith we are not to except Minors, if they are capable of understanding what they promise. For the Privileges allowed to Minors arise from the Civil Law; whereas we now speak of the Law of Nations.

IV. When an Error does excuse it,

IV. And we have already said of Promises made by mistake, that we have a Power to retract them, when that which through Error believed, was, as it were, the Condition of the Promise.

V. An Objection made from publick Profits answered.

V. 1. But how far the Power of private Men may extend in making any Contract, is a more difficult Question. It is certain, that no private Person can alienate what is publick; for if this be not allowed to Generals, much less to private Men, as I have proved in another Place. But yet it is to be disputed, whether their Covenants made with their Enemies of their own private Concerns, whether Actions or Things, may stand; because we cannot grant those to the Enemy, without some Damage to our own Party. Whence it appears, that all such Covenants are unlawful, whether with Citizens, on the Account of the Sovereign Power of their City over them, or with Mercenary Soldiers in regard to their Military Oath.

2. But we must observe, that such Agreements, which prevent a greater or more certain Mischief, are to be esteemed rather beneficial than hurtful, even to the publick; because a lesser Evil has comparatively the appearance of good: *Of Evils the less is to be chosen*, as one says in *Appian*. Yet neither can that bare Faith, whereby a Man does not absolutely renounce all Power over himself, and what he has, nor can the publick Benefit without the Authority of a Law, have that Power, as to make

make void that which is done, so that it shall have no Effects of a just Right, tho' we should grant that what was promised was against the Duty of the Promiser.

3. The Law indeed can take away this Power from Subjects, whether Natives or Sojourners, but yet it does not alway do so, for it spares Citizens. Neither can it always do it, for Human Laws (as I have said already) do then bind, when made after a Human way, not when they impose any thing that is absolutely unreasonable, and unnatural. Therefore those Laws and special Precepts, which manifestly enjoin such things, are not to be accounted Laws. But general Laws are to be taken in a Sense so favourable to Humanity, as to exclude Cases of extreme Necessity.

4. But if that Act, which was prohibited by any Law, or Precept, and declared void, might with equal Right be so Prohibited, then that Act of a private Person shall be void, but he may also be punished, because he promised what he had no Right to perform, especially if being bound by Oath he did it.

VI. The Promise of a Captive to return unto Prison is justly binding, because it does not render his Condition worse than it was. Therefore that Action of *M. Regulus* was not only glorious (as some account it) but what was his Duty. *Regulus*, says *Cicero*, ought not by his Perjury to have violated the Conditions and Covenants of War, notwithstanding what *Horace* says,

VI. These applied to our Faith given to return into Prison.

*Atque sciebat, quæ si barbarus
Tortor pararet —*

*What Cords and Wheels, what Racks and Chains,
What lingering Tortures for his Pains
The barbarous Hangman made, he knew.*

*Creech.
For*

For when he promised to return he knew what they might do. So of the ten Captives, as *Gellius* relates it from old Writers, *Eight declared they had no Right to Postliminy, because (a) they were bound by Oath to return.*

VII. Not
to return to
such a place,
or bear
Arms a-
gainst such
a Party.

VII. 1. Some Prisoners are released upon their Promise, not to return to such a Place, or not to bear Arms against the Releaser. We have an Example of the former in *Thucydides*, where the *Messenians* in *Ithome* promised the *Lacedemonians* to depart out of *Peloponnesus*, and never to return again: The latter is now common. There is an ancient Example in *Polybius*, where the *Numidians* were dismissed by *Amiltar*, upon condition, *That none of them should bear Arms against the Carthaginians.* (b) *Procopius* has the like Condition in his *Gothicks*.

2. Some maintain this Agreement to be void, because it is contrary to the Duty which we owe to our Country: But not every thing that is against our Duty, is immediately void, as I said before. Besides, it is not against our Duty, to procure our Liberty by such a Promise; because being detained under the Power of the Enemy, we are then as useless to our Country, as if we were really dead.

VIII. Not
to make an
Escape.

VIII. Some also promise not to make their Escape; this also binds them, tho' they were Prisoners when they made it; tho' some are of another Opinion. For by this very Promise sometimes our Lives are saved, or we have more Liberty allowed. But if after this Promise, a Person be under closer Confinement, he is thereby discharged of that Promise, if he made it upon

(a) *Because they were bound by Oath.* That is, *Capitis Minores*, reduced to Bondage, as *Horace* says of *Regulus*.

(b) *Procopius.* Goth. 2. of the *Hernli*.

upon that condition, that he should not be bound.

IX. It is a foolish Query some make, whether a Person taken Prisoner by one, may yield himself to another. For it is very plain, that no Man can take away that Right, which another has taken by Contract. For by the very Right of War, or partly by the Right of War, and partly by the Grant of him that makes the War, a Prisoner taken in War belongs to the Captor, as we have said before.

IX. A Captive taken by one, cannot yield himself to another.

X. There is a remarkable Question concerning the Effects of such Agreements, namely, whether private Men upon their neglecting to perform what they have promised, may be compelled to it by their Sovereign. And that they may, but only in a solemn War, by the Right of Nations, which binds those that make War, to do what is Right and Just to each other, even concerning the Facts of private Men; as if an Ambassador sent from the Enemy should be assaulted by a private Person. Thus *A. Gellius* quotes out of *Cornelius Nepos*, (c) That many in the Senate agreed, that those two of the ten, who being obliged by Oath to return, refused, should by a strong Guard be delivered up to Hannibal.

X. Whether private Men may be compell'd by their Sovereign, to perform what they have promised.

XI. We must observe those Rules already mentioned, concerning the Interpretation of Words in such Agreements, that is, we ought not to recede from the proper Signification of the Words, unless to avoid an Absurdity, or caused by some very probable Conjectures; or where the words are dubious, then we are to incline to that Sense that is most against him which gives the Law.

XI. What Interpretation to be allowed in such Covenants.

XII. He

(c) That many in the Senate agreed.] The same Senate had not long before obliged those to return, whom *Pyrrhus* had conditionally dismissed. *Appian Exc. Legat. num. 6.*

XII. How
we must
take these
words. Life,
Apparel,
the coming
of Aids.

XII. He that agrees only for his Life, has no Right to his Liberty; under the name of Apparel, Arms are not comprehended, for they are distinct things. Aids are said then to come when they are in fight, tho' they do nothing, for their very appearance has some Influence.

XIII. Who
may be said
to return to
the Enemy.

XIII. But he cannot be said to return to the Enemy, who returning privately, departs again immediately; for our Promise to return is to be so understood, that we shall be again in the Power of our Enemy; the contrary Interpretation is reputed by *Cicero* trickish, and foolishly crafty, comprehending Fraud and Treachery. *Gellius* calls it a fraudulent Cheat, always branded by the Censors with Reproach, and the Practisers of it rendered hated, and incapable of making a Will.

XIV. Succours, when
said to
come.

XIV. (d) In Agreements made not to surrender, if just Succours should come, we must by them understand, such as are sufficient to free us from all Danger.

XV. The
manner of
Execution
makes no
Condition.

XV. This also is to be observed, if any thing be agreed on concerning the manner of execution, that shall be annexed to the Agreement as a Condition; as if a safe Conduct be granted to such a Place, and that Place, before we can get thither, be in the Enemies Possession.

XVI. Of
Hostages to
perform
such Cove-
nants.

XVI. We must judge of Hostages as above-said; sometimes they are but Securities for the Acts of the Principal; but yet it may be so covenanted, that the Obligation may be separately understood, that is, that such a thing shall be done, or the Hostages may be detained. But in a dubious

(d) *Just Succours in Agreements of Surrender.*] Four Examples of such an Agreement, are brought by *Procopius*, *Goth.* 3. Another of *Duen* in *Agathias*, B. 1. of the Castle of *Corfica*, in *Bizar. Histor. Gentium* 10. Another, B. 18. and in the War against the *Moors*. *Cromer* also has one like it, B. 11.

ous Case, we must incline to that which is most natural, that is, that they shall be reputed as Sureties only, 'till such things be performed.

C H A P. XXIV.

Of Faith tacitly given.

I. **T**HAT some things are agreed on by Silence, was not ill observed by *Javolenus*, which is usual in most Agreements, whether publick, private, or mixt. The Reason is this, because it is the Consent, howsoever signified and accepted, that has the Power of transferring Right. But this Consent may be express'd otherwise than by Words and Letters, as we have frequently shewed already. For some Signs are naturally included in the Act it self.

I. *How Faith may be given by Silence.*

II. As for Example. He that coming from an Enemy, or a Stranger, commits himself to the Faith of another King, or People; does without doubt tacitly oblige himself to do nothing against that State, whose Protection he desires; wherefore we are not to join with them that justify the Act of *Zopyrus*, for his Loyalty to his King could not justify his Treachery to those unto whom he had fled. The same may be said of *Sextus* the Son of *Tarquin*, who retired to *Gabii*, and *Virgil's* upon *Sinon*,

II. *An Example in one desiring to be received into Protection by any Prince or People.*

*Accipe nunc Danaum insidias, & crimine ab uno
Disce Omnes —*

*Now hear how well the Greeks their Wiles disguis'd;
Behold a Nation in a Man compris'd.* Dryden.

III. So

III. He that
desires or
admits a
Party.

III. So he that demands, or admits of a Parly, silently promises, (a) that during the Parly both Parties shall be secure. *Livy* calls it a breach of the Law of Nations, when Enemies under the pretence of a Treaty watch to destroy each other. He terms it, *A Treaty perfidiously broken.* *Val. Maximus* passes this Censure on *Cn. Domitius*, who had invited *Bituitus* King of *Auvergne* to a Treaty, and had entertained him as his Guest, and then treacherously bound him, *His insatiable Ambition of Glory made him be perfidious.* Wherefore I admire, why he that wrote the 8th Book of *Cæsar's Gallick Wars*, whether *Hirtius*, or *Oppius*, relating the like Act of *F. Labienus*, adds these words, *He supposed, that Comius's Disloyalty might be suppressed without any imputation of Treachery to himself.* Unless this be rather the Judgment of *Labienus*, than of the Writer.

IV. It is
lawful for
either Party
to promote
his own In-
terest, so
that he does
not hurt the
other.

IV. But we must not enlarge this Tacit Consent beyond what I have said; for if they are inoffensive to each other in the Conference, and under the Colour of it divert the Enemy from Warlike Counsels, and in the mean time advance their own Affairs, it is far from Treachery, and is accounted commendable Policy. Wherefore they who blamed King *Perseus*, for being deluded with the hopes of Peace, had not that regard to Justice and Fidelity, as to a generous Mind, and martial Glory, as may be sufficiently gathered from what has been already said of Stratagems usual in War. Of this kind was that Policy, by which *Asdrubal* saved his Army out of the *Arsetan* Forests; and by which *Scipio Africanus* the elder discovered the Situation

(a) He silently promised, that during the Parly both Parties shall be secure. *Agathias* justly blames *Ragnaris* the Hun, that he would have killed *Narseus* returning from a Conference, *Agath. B. 2.*

Situation of *Syphax* his Camp, both recorded by *Livy*. Whose Example (b) *L. Sylla* followed in the Social War at *Essemia*, as *Frontinus* tells us.

V. There are also some dumb Signs, significant through Custom; as of old Hair-laces, and Branches of Olives; and among the *Macedonians*, the Erection of Pikes; among the *Romans*, (c) the covering their Heads with their Shields, (d) the usual Signs of a submissive Surrender, which forthwith oblige to the laying down of Arms. But he that would signify his accepting of a Surrender, whether he be obliged, and how far, may be easily learnt from what has been said already. (e) Among us the hanging out a white Flag is a Tacit Sign of demanding a Parley, and shall be as obligatory, as if expressed by Words.

VI. We have already declared how far an Agreement made by a General, may be believed to be tacitly approved by the Prince or People; as when the Act is fully known, and thereupon something done, or not done, of which no other Reason can be given, but their Consent to the Agreement.

VI. Of a silent Approbation of something demanded.

VII. A

(b) *L. Sylla*.] And *Cæsar* the Dictator against the *Belustri*, and *Cispes*, *Appian Excerpt. Legat. num. 16.*

(c) The covering their Heads with their Shields.] *Appian Civil. 2.*

(d) The usual Signs of a Submissive Surrender.] Among the *Persians*, the Hands folded together behind the Back, *Ammianus*, B. 18. Upon which place see the Notes of *Lindembrogius*, the turning the Shields and Banners downwards among the *Romans*. *Ammianus* observes the same, B. 26. to lay down their Ensigns. *Latinus*, *Pneatus Panegyric*. Among the *Germans*, and others, from their Example of holding forth of Grass, *Pliny*, B. 22. They who being vanquished surrender themselves, casting away their Arms, beg Mercy, says *Servius* upon the 2d *Æneid*.

(e) Among us the hanging out a white Flag is a Tacit Sign of demanding a Parly.] The kindling of a Fire among the Northern Nations, as *Johannes Magnus* and others relate, *Pliny*, B. 15. *de Lauris*, of the Laurel. All which are signs of Peace, as also to hold out any thing among armed Enemies, is a token of Quiet.

VII. (f) A Punishment cannot be supposed to be remitted from its being for a time dissembled; but some other Act must necessarily intervene, which may either by it self argue a perfect Friendship, as a League made with such a one; or at least so great an Opinion of the Virtue of the Person to be punished, that his former Actions may merit a Pardon, or this Opinion be expressed by words, or by any other means, as are usually taken to signify as much.

CHAP. XXV.

The Conclusion, with Admonitions to preserve Faith and Peace.

I. Admonitions to Princes to keep their Faith.

I. I. **A**ND here I hope I may make an end; not that I have said all that might have been said, but that which hath been said may be enough to lay a Foundation, on which if any other will build a more stately Fabrick, I shall be so far from envying him, that I shall heartily thank him. Yet before I dismiss my Reader, as before, when I began to treat of War, I brought some Arguments to perswade all Men, to the utmost of their Power, to prevent it. So now I shall add some few Motives, to exhort all Men, both in and after the War, to keep their Faith, and maintain Peace; but especially to preserve their Faith, as for many other Reasons, but particularly this, least

(f) *The Remission of a Punishment.*] Polybius preserved in *Excerpta Legat.* 22. If the Punishment be remitted to them that commit the Fact, it be also to them that employ them. I do not think it. For each Person must answer for his own Crime.

lest all hopes of Peace be taken away. For by Faith, (says Cicero) not only every State is preserved, but that grand Society of Nations is maintained. If this be taken away, says Aristotle rightly, ἀνθρώπων ἡ πρὸς ἀλλήλους χρεία ἔσται ἀνθρώπων, All Human Correspondence ceases.

2. Therefore the same Cicero calls it detestable to break Faith, which is the Preservation of Life, and, as Seneca says, *The most Sacred Good of the Rational Soul*. Which Sovereign Princes ought the more solemnly to keep, by how much they offend with more Impunity than others. Wherefore take away Faith, (a) Men will be like mere Brutes, whose Rage all Men dread. Justice indeed in her other Parts, has something that is obscure, but the bond of Faith is self-evident, and to that end do Men engage their Faith in their Dealings, that all Doubts may be removed.

3. How much more then does it concern Princes religiously to observe their Faith, first for the sake of their Conscience, then for that of their Reputation, wherein consists the Authority of a Kingdom. Let them not then doubt, but that they who endeavour to insfil into them such deceitful Principles, practise the same they teach. Their Practices cannot possibly prosper long, which render Men unsociable to Men, and hateful to God,

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Aa

II. Fur-

(a) Men will be like mere Brutes.] Justinian's Embassadors in Procopius, thus address Chosroes, Persic. 2. If this Speech were not made in thy Presence (O King) we should never have thought that Chosroes, Son of Cabades, would have entered armed into the Roman Territories, in contempt of all his former solemn Oaths, which among Men are esteemed the highest and most sure Pledge of Truth and Faith, besides breaking of Leagues, which is the only hope left to them, who for the Miseries of War cannot live in Safety: For what can we call this else, than to change the Life of Man into that of a brute Beast? For take away Leagues, the Consequence will be, all Men will be engaged in continual Wars. And Wars without end have this Effect; that they continually keep Men (as it were) banished from their own Nature.

II. The design of War to settle a firm Peace.

II. Further, it is impossible that any Soul should throughout the whole course of a War rest secure, and perform its Duty to God, that does not always aim at Peace. For it was very truly said of *Salust*, *That wise Men, for the sake of Peace, make War*. To which agrees the Opinion of *St. Augustine*, *We seek not Peace, to make War; but we make War, in order to establish Peace*. *Aristotle* himself often condemns those Nations that make War their chief Trade. Force is in it self brutish, which is yet very eminent in War; wherefore it ought to be the more carefully managed with Clemency and Humanity, lest by too much imitating Beasts, we absolutely forget the Man.

III. Peace to be embraced, tho' with Loss, especially among Christians.

III. A safe and honourable Peace then is not too dearly bought, at the expence of forgiving Offenders, Damages, and Charges, especially among Christians; to whom our Lord bequeathed Peace, as his last Legacy, whose best Expositor *St. Paul*, *Rom. xii. 18. would have us live peaceably with all Men, as far as in us lies*. A good Man unwillingly enters a War, nor is willing to come to the Extremity, as *Salust* tells us.

IV. Peace is profitable to the Conqueror.

IV. It is enough if we can obtain Peace, but for the most part the common Interest requires it. First, those that are weakest, because it is dangerous to contend long with one more mighty; and as in a Ship, if we can in a violent Storm save our Lives by throwing our Goods over-board, so in a War it will be a good Purchase, if by parting with some, we may secure the whole remainder; leaving those vain Arguments drawn from Hope and Revenge, to their deluding Authors, as *Livy* rightly calls them; which (b) *Aristotle* thus

(b) *Aristotle thus expresses.* And *Philo of the Instruction of a Prince* after this manner, *Peace, tho' with great Damage, is better than War.*

thus expresses, *It is much better for them, who think themselves the strongest, to part with somewhat of their Right, than to hazard all to an uncertain Victory.*

V. Yea, and to the strongest Party is Peace most profitable, because they enjoy their own (as the same *Livy* most truly says) in Plenty and Prosperity, which is better and safer than a hoped-for Victory. For we must consider, that the Success of War is uncertain. *Aristotle* says, *We must remember how many and unforeseen Changes happen in War.* *Diodorus* in an Oration for Peace blames those, *Who boast of their great Exploits done in War, as if it were not usual for Fortune to favour sometimes one Side, sometimes another.* And (c) the bold Attempts of desperate Men are as much to be feared, as the sharp Teeth of dying Beasts.

V. And to the Conqueror.

VI. But what if both Parties seem to be of equal Strength? Then (in the Opinion of *Cæsar*) it is the fittest time to treat of Peace, whilst each Party presumes upon his own Strength.

VI. And to those whose Affairs are doubtful.

VII. But Peace being made, whatever the Conditions be, they ought to be punctually observed, to preserve our Faith. For we ought to be very careful to avoid Perfidiousness, and whatsoever may exasperate the Adversary. For what *Cicero* said of private Friendship, may be fitly applied to publick. If all Friendships are to be preserved faithfully and religiously, surely those most especially, that from an open Hostility are reconciled by a happy Peace.

VII. Peace once made to be religiously kept.

VIII. May

(c) The bold Attempts of desperate Men are most to be feared.]

Δεσφὸν ἔσθ' ἡ κοῖται ἀποχομένοιο λέοντος.

Most dreadful is th' expiring Lion's Den.

VIII. The
Author's
Wish, and
the Conclu-
sion.

VIII. May the *Almighty* then (who alone can do it) impress these Maxims on the Hearts of those, who have the Affairs of *Christendom* left to their Management; may he enlighten their Minds with the Knowledge of ev'ry *Right*, Divine and Human, and inspire 'em with the Constant and Dutiful *Sense* of their being the *Ministers of Heaven*, ordain'd to govern *Men*; (d) *Men*, for whom, of all his Creatures, *God* has the greatest *Regard* and *Affection*.

(d) *Men*, for whom, of all his Creatures, *God* has the greatest *Regard* and *Affection*.] So said *St. Chrysostom* in his *Sermon* concerning *Alms*. Ἀνθρώποι τοὺς θεοὶς ἀγαπᾶται ὁ Θεὸς ὡς υἱοὶ, *Men* is a Creature earnestly desired (or taken care of) by *God*.

*The End of the Books concerning the Rights
of War and Peace.*

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B b *Christian*

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